

No. 11877

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VAN CAMP SEA FOOD COMPANY, INC., a corporation,

Appellant,

vs.

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA, MIKE DiLEVA, SALVATORE DiLEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNAVALE, MATTEO VOLOGNA, PASQUALE GUGLIELMO and PIETRO COLOMBO,

Appellees.

APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States
for the Southern District of California

Central Division

FILED

JUN 2 - 1948

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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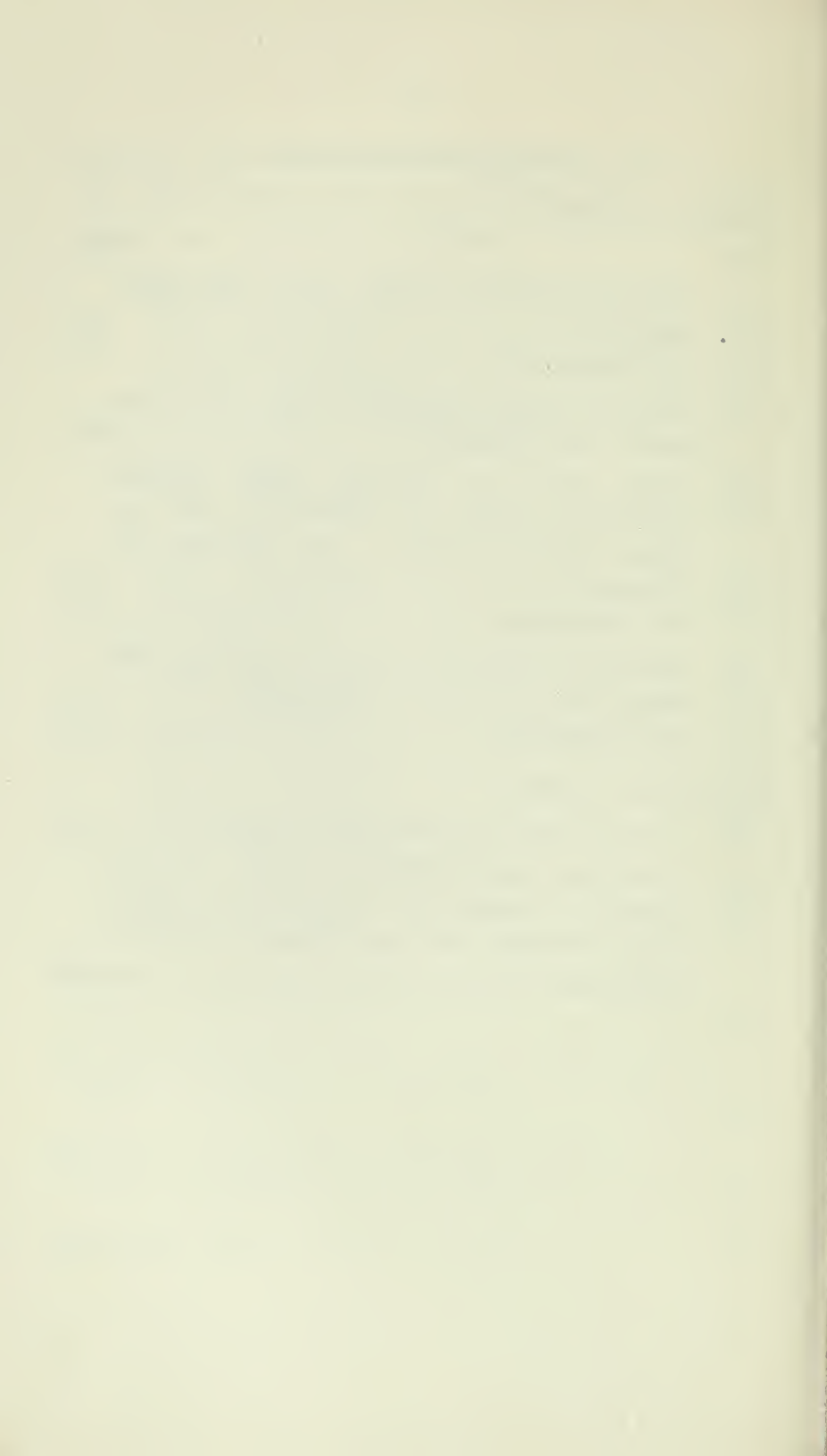
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NAMES AND ADDRESSES OF PROCTORS:

For Appellant:

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

704 Roosevelt Building
Los Angeles 14, Calif.

For Appellees:

HERBERT R. LANDE

413 West Seventh Street
San Pedro, Calif. [1*]

In the United States Circuit Court of Appeals
for the Ninth Circuit

SALVATORE DiLEVA, et al.,

Appellees,

vs.

VAN CAMP SEA FOOD COMPANY, INC.,

Appellant.

CITATION

UNITED STATES OF AMERICA, ss.

To Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnavale, Matteo Bologna, Pasquale Guglielmo and Pietro Colombo: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of March, A. D. 1948, pursuant to an order allowing appeal filed on January 29, 1948, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 4630 B. H., Central Division, wherein Van Camp Sea Food Company, Inc. is appellant and you are appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 29th day of January, A. D. 1948, and of the

Independence of the United States, the one hundred and seventy-second, Judge Peirson M. Hall being absent and without this District.

PAUL J. McCORMICK

U. S. District Judge for the Southern District of California

Service of a copy of the foregoing Citation is acknowledged this 29 day of January, 1948.

HERBERT R. LANDE

Attorney for Appellee

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [2]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 4630-B. H.

ANTHONY DiLEVA, et al.,

Libelants,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation,

Respondent.

SECOND AMENDED LIBEL IN PERSONAM FOR
DAMAGES DUE TO COLLISION

To the Honorable, the Judges of the United States District Court, Central Division, Southern District of California:

Come now the libelants Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack

Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, Pietro Colombo, and for a cause of action in admiralty in personam, Civil Maritime, allege as follows:

I.

That the libelants are fishermen and seamen and, at the time of the collision alleged hereafter, were members of the crew of the American fishing vessel called the Bessemer; that at said time, the respondent was the owner of said vessel and that Anthony DiLeva was operating said vessel by authority of being [34] appointed master thereof by the respondent.

II.

That prior to and at the time of the collision alleged hereafter, said vessel was in commercial fishing for sardines in waters off the California Coast; that libelants were serving on said vessel under a share agreement, whereby the value of the fish caught, after deducting fuel and groceries, was divided into 18.75 shares, and of that total, each crewman received one share, and the captain one-half share in addition; that all of the libelants were crewmen receiving one share, except Anthony DiLeva, who was master of the vessel, and he received a share and one-half for compensation as master.

III.

That the respondent was at the time of the collision alleged hereafter, also the owner and operator, having full management, direction and control, of the American fishing vessel called the "Gloria R."; that the master of said

vessel was the employee and agent of the respondent; that the crew of the said vessel were employees of the respondent and were acting within the scope and course of their employment.

IV.

That on or about October 4, 1944, at or about 9:15 P. M., the "Bessemer" was engaged in fishing operations off Catalina Island; that the "Bessemer" was proceeding with all running lights burning; that at said time the "Bessemer" was approximately two to three miles off the East end of Avalon, Catalina Island; that at said time, the vessel was ready to make a set with the net; that the vessel's skiff was in the water, manned and the end of the net was in the skiff; that at said time the vessel was in a large school of fish (sardines); that at said time the vessel was moving ahead slowly to lower the net, headed towards the East end of the Island with the Island approximately dead ahead; that the "Bessemer" thereupon circled to the right in a clockwise direction; that the "Gloria R." [35] at that time was approaching from the north headed towards the east end of Catalina, proceeding in a southwesterly direction and traveling at a speed of approximately seven or eight knots per hour; that the "Gloria R." crossed the bow of the "Bessemer" at a time when the "Bessemer" had practically completed a circle so that it was again headed in an almost westerly direction; that the "Gloria R." thereupon turned left and circled counter-clockwise at full speed of seven or eight knots; that the "Gloria R." continued to circle counter-

clockwise in such a manner that the path of the "Gloria R." again crossed the path of the "Bessemer" so that at a time prior to the collision the red running light of the "Gloria R." was visible about two points off the bow of the "Bessemer"; that thereupon the "Gloria R." continued to turn to the left towards and in front of the "Bessemer" and showed her green light to the "Bessemer"; that then the "Bessemer" sounded her whistle and reversed engines, then the "Gloria R." swung hard left and crossed directly in front of the "Bessemer's" path and while so crossing in front of the "Bessemer", the "Gloria R." crashed with her starboard side into the "Bessemer".

That the master and crew navigating the "Gloria R." were guilty of careless and negligent acts in that:

(1) They handled, operated and navigated the "Gloria R." so that said vessel swung to left across the bow of the "Bessemer" and continued swinging to left until collision occurred.

(2) They failed to keep an adequate lookout.

(3) They were running the "Gloria R." at an excessive speed.

That each and every of the aforesaid acts of negligence were direct and proximate causes of the collision alleged aforesaid.

V.

That as a proximate result of said negligence of the master and crew of the "Gloria R.", the "Bessemer" was laid up for repairs from October 4, 1944 to on or about October 13, 1944, and during [36] said time the vessel

and its crew lost eight fishing days; that the loss of earnings proximately caused by the said lay up was \$500.00 for each libelant except the master, whose loss was \$750.00; that libelants have demanded payment of said damage from respondent, and respondent has failed and refused to pay same or any part thereof.

VI.

That all and singular the premises are true and within the maritime and admiralty jurisdiction of this Court.

VII.

That the respondent does business in and has officers who reside in the Southern District of California, Central Division.

Wherefore, libelants pray that process in due form of law according to the course and practice of admiralty issue against respondent, citing it to appear and answer all and singular the allegations aforesaid; and that this Court be pleased to decree to libelants payment of the loss aforesaid in the sum of Six Thousand Seven Hundred Fifty Dollars (\$6,750.00) plus costs of suit herein; and for such other and further relief as to the Court seems just.

HERBERT R. LANDE

Proctor for Libelants [37]

[Verified.]

[Endorsed]: Filed Feb. 26, 1946. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

EXCEPTIONS TO SECOND AMENDED LIBEL

Comes now Van Camp Sea Food Company, Inc., respondent herein, and excepts to the second amended libel filed herein as follows:

I.

Excepts to the sufficiency of said second amended libel, and the whole thereof, on the ground that the facts averred in said second amended libel are insufficient to constitute a cause of action.

Wherefore, Respondent Prays that its exceptions be sustained without leave to amend, and that said second amended libel may be dismissed.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondent [39]

* * * * *

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 14, 1946. Edmund L. Smith,
Clerk. [40]

[Title of District Court and Cause]

ANSWER OF RESPONDENT TO SECOND
AMENDED LIBEL

To the Honorable, the Judges of the United States District Court, Southern District of California, Central Division:

The answer of Van Camp Sea Food Company, Inc., to the second amended libel in personam of the libelants, herein sometimes referred to as "said libel", denies, admits and alleges as follows:

I.

Respondent admits the allegations of Article I of said libel.

II.

Respondent admits the allegations of Article II of said libel with respect to the share agreement and in this connection [41] alleges that, as a result of said agreement, libelants became the employees of the respondent, and their wages were contingent upon and dependent upon the profitable operation of said fishing vessel Bessemer; said employment was for no specific period of time, and libelants were free to quit respondent's employ, and respondent was free to discharge libelants, or any or all of them, at any time. Respondent further alleges that, as owner of the said fishing vessel Bessemer, it solely was entitled to the profits, if any, from the operation of said fishing vessel Bessemer, and that, if any profits were made during a period of time said libelants remained in respond-

ent's employ, respondent was thereafter obligated to account to libelants for their shares of said profits in accordance with the share agreement.

III.

Respondent admits the allegations of Article III of said libel.

IV.

Answering unto the allegations of Article IV of said libel, respondent alleges that the said allegations are in a large part untrue and falsely alleged and respondent therefore denies each and all of the allegations therein contained except insofar as they may be hereinafter admitted to be true, and upon information and belief alleges the circumstances of the said collision to be as follows:

The Gloria R was engaged in fishing operations on October 4, 1944, in the vicinity of Catalina Island; at about 9:15 p. m. of said date, about four miles north of the easterly end of said Catalina Island, while searching for fish, she was proceeding in a generally northerly direction, at a cruising speed, with all [42] running lights burning; that the Bessemer was proceeding in a generally easterly direction bearing off the port bow of the Gloria R; that the Bessemer crossed the course of the Gloria R and cleared the Gloria R, but immediately thereafter turned hard to starboard so that the Bessemer's course curved toward the south and back toward the west until the Bessemer was headed in approximately a southwesterly direction, and directly toward the starboard side of the Gloria R; that when the Bessemer continued to turn toward the Gloria R, a collision became imminent, and the Gloria R was turned hard to port in an effort to avoid the impending collision, but the stem of the Bessemer

struck and collided with the starboard side of the Gloria R aft of amidships. Further answering the allegations of said Article IV, respondent denies that the master and crew of the Gloria R, or any of them, were guilty of careless and negligent acts, or careless acts or negligent acts as alleged, or in any respect; denies that they or any of them handled or operated or navigated the Gloria R so that said vessel swung to the left across the bow of the Bessemer and continued swinging to left until collision occurred as alleged, but respondent admits that the Gloria R was turned hard to port in an effort to avoid the collision which was then and there impending because of the alteration of the course of the Bessemer; respondent denies that the master or crew of the Gloria R, or any of them, failed to keep an adequate lookout; respondent denies that the master or crew, or any of them, were running the Gloria R at an excessive rate of speed; respondent denies that the master and crew, or master or crew, of the Gloria R, or any of them, were negligent in any respect whatsoever and in this respect alleges that the said collision was due solely to negligence and fault of the Bessemer, her master and crew, libelants in this action, in [43] the following respects, as respondent is informed and verily believes:

- 1) The officers and crew of said Bessemer were not properly stationed and were not attending to their duties;
- 2) The said Bessemer and her navigators failed to observe the Gloria R and failed to avoid running into her;
- 3) The said Bessemer failed to exhibit lights as prescribed by Article 9 of the International Rules for the Prevention of Collisions;

- 4) The said Bessemer, after having crossed the course of the Gloria R from port to starboard, negligently failed to maintain her course but put her rudder hard right, and turned sharply toward and into the said Gloria R;
- 5) The said master and crew of the Bessemer were negligent and failed to exercise due care and prudence to avoid colliding with the Gloria R under the special circumstances then and there existing; and
- 6) The said Bessemer failed to keep out of the way of the said Gloria R, as required by Article 19 of the International Rules for the Prevention of Collisions, but on the contrary, crossed ahead of said Gloria R and turned back into her.

Respondent denies that any acts of the master and crew, or master or crew, of the Gloria R, or any of them, were negligent as alleged in said libel or otherwise, or were the direct and proximate, or direct or proximate cause or causes of said collision, or contributed in any way thereto, and respondent alleges on the contrary [44] that the said collision was due solely, directly and proximately to negligence and carelessness of the said Bessemer and her master and crew, libelants in this action as aforesaid.

V.

Answering the allegations contained in Article V of said libel, respondent admits that the Bessemer was laid up for repairs from October 4, 1944, to on or about October 13, 1944, a period of eight fishing days, as a result of said collision, but denies that said layup of said Bessemer was a proximate result of negligence of the master and crew, or master or crew, of said Gloria R,

or any of them. Respondent alleges that said Bessemer sustained damage to the extent of \$1,829.48, and that said damage and said layup of said Bessemer was due solely, directly and proximately to negligence and fault of the said Bessemer and of libelants, her master and crew.

Respondent alleges that there were no profits made from the operation of the said fishing vessel Bessemer during the periods mentioned in said libel and, therefore, denies that each of the libelants, excepting the master, suffered a loss of earnings of approximately \$500, or any other amount, and denies that the master has suffered a loss in the amount of \$750, or any other amount; respondent alleges that if libelants, or any of them, did not engage in fishing operations during said period of eight days, said circumstance was due solely and proximately to their own fault and neglect; respondent alleges further that said libelants were free and able to obtain other employment during said period and that if any loss of earnings was sustained by them, said loss was voluntarily sustained and is not a loss for which respondent is liable. Respondent admits that libelants have demanded payment of the respondent for the amounts set forth in said libel and that respondent [45] has declined payment thereof, for the reason that no sum or sums as alleged or in any amount were or are due libelants under said share agreement or otherwise by reason of said operations of the said Bessemer.

VI.

Respondent denies that any of the premises of the said libel are true, except as herein specifically admitted, but admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VII.

Respondent admits the allegations of Article VII of said libel.

Further Answering said second amended libel, respondent alleges that the facts averred in said libel are insufficient to constitute a cause of action.

Wherefore, respondent prays that the amended libel and this suit be dismissed hence with costs to the respondent, and that the respondent have such other and further relief as shall be deemed just and proper in the premises.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Respondent [46]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 14, 1946. Edmund L. Smith,
Clerk. [47]

[Title of District Court and Cause]

MEMORANDUM

Upon reading the briefs and after consideration of the evidence, I am of the opinion that the Gloria R was at fault and that by reason thereof the fishermen of the Bessemer suffered a loss. This loss or damage in my opinion should not be figured on a basis of what they might have earned as claimed by libelants but as figured in The Page, Fed. Case No. 10660, page 977.

The legal questions involved, in view of the evidence, have me in a state of confusion. The pleadings allege the relationship of employer and employee and the answer admits such allegations, yet, the charter party agreement (Libelants' Ex. 3) convinces me to the contrary. While the charter party agreement had expired, I believe by the conduct and acquiescence of the parties it continued in effect at the time of the collision. If I am correct in this respect the fishermen were not employees of the respondent.

It has been intimated that the Gloria R was being operated under a similar agreement. If such is true the charterers of the Gloria R would be the proper respondents.

I am inclined to the view, that in the absence of more formidable authorities I should follow *U. S. v. Laflin et al.*, 24 Fed. (2d) 683. It seems that this obstacle created by this authority could be eliminated by the filing of an amended libel. Whether or not the master or any of [48] the fishermen could recover in view of Libelants' Ex. 3 will have to be left open for future argument.

Under the circumstances, I shall allow libelants to file an amended libel within ten days and the respondent a similar length of time to file its reply.

In the absence of any amended pleadings I shall proceed to dispose of the case.

Dated: this 8th day of August, 1946.

BEN HARRISON

Judge

[Endorsed]: Filed Aug. 8, 1946. Edmund L. Smith, Clerk. [49]

In the United States District Court
Southern District of California
Central Division

In Admiralty No 4630-B H.

SALVATORE DiLEVA,

Libelant,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation,
and GENNARO DeLEVA,

Respondents.

FIFTH AMENDED LIBEL

To the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California:

The libel of Salvatore DiLeva against Van Camp Sea Food Company, Inc., a corporation, and Gennaro DeLeva, in a cause of action in personam, civil and maritime, respectfully alleges:

I.

That at the time of the collision hereafter alleged, the respondent Van Camp Sea Food Company was the owner of the oil screw "Bessemer", a fishing vessel; that the libelant was in possession of said vessel under an oral agreement with the respondent whereby the libelant was given possession of the vessel for the sardine season then in progress, the libelant placed his sardine net on the vessel for the season, the libelant engaged the crew and had the power to discharge any one, the libelant nominated the master and he was appointed by the respondent, the activities and [75] conduct of crew and

master were subject to control of the libelant, the compensation of the respondent was two and three-quarter shares out of a total of eighteen and three-quarter shares of the proceeds of the fish caught, the fish caught must be delivered to the respondent, who paid each crew man one share of the value thereof based on Twenty-two dollars (\$22.00) per ton for sardines; that the libelant, crew members and master were carried on the books of account of the respondent as its employees and deductions from their wages were made by respondent for social security taxes and withholding taxes; that the compensation to libelant for the use of his net on said vessel was two and one-half shares.

II.

That pursuant to the agreement aforesaid, the libelant engaged the following persons as members of the crew of said vessel, and at the time of said collision, they were in the service of said vessel: Ivan Jurjev, Marie DiLeva, Mike DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolino, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, and Pietro Colombo; that libelant nominated and respondent Van Camp Sea Food Company appointed Anthony DiLeva as master of said vessel, and he was acting as such.

III.

That for the purposes of this suit, libelant sues for himself and on behalf of each and every of the aforesaid members of the crew of the "Bessemer".

IV.

That prior to and at the time of the collision alleged hereafter, the libelant, pursuant to his said agreement with the respondent Van Camp Sea Food Company, had

taken said vessel to sea and engaged in fishing operations for sardines in waters off the Southern California Coast.

V.

[76]

That at the time of the collision alleged hereafter, the respondent Van Camp Sea Food Company was the owner of the oil screw fishing vessel called the "Gloria R."; that said respondent either employed the respondent Gennaro DeLeva to operate the vessel for it, or gave a demise or bare-boat charter to him; that the facts of said transaction are known to respondents and not known to libellant; that the respondent Van Camp Sea Food Company and Gennaro DeLeva or the respondent Van Camp Sea Food Company or the respondent Gennaro DeLeva employed a master and crew thereon; and that at all times mentioned herein, said master and crew were acting within the scope and course of their employment.

VI.

That on or about October 4, 1944, at or about 9:15 P. M., the "Bessemer" was engaged in fishing operations off Catalina Island; that the "Bessemer" was proceeding with all running lights burning; that at said time the "Bessemer" was approximately two to three miles off the East end of Avalon, Catalina Island; that at said time, the vessel was ready to make a set with the net; that the vessel's skiff was in the water, manned and the end of the net was in the skiff; that at said time the vessel was in a large school of fish (sardines); that at said time the vessel was moving ahead slowly to lower the net, headed towards the East end of the Island with the Island approximately dead ahead; that the "Bessemer" thereupon circled to the right in a clockwise direction; that the "Gloria R." at that time was approaching from the north

headed towards the east end of Catalina, proceeding in a southwesterly direction and traveling at a speed of approximately seven or eight knots per hour; that the "Gloria R." crossed the bow of the "Bessemer" at a time when the "Bessemer" had practically completed a circle so that it was again headed in an almost westerly direction; that the "Gloria R." thereupon turned left and circled counter-clockwise at full speed of seven or eight knots; that the "Gloria R." continued to circle [77] counter-clockwise in such a manner that the path of the "Gloria R." again crossed the path of the "Bessemer" so that at a time prior to the collision the red running light of the "Gloria R." was visible about two points off the bow of the "Bessemer"; that thereupon the "Gloria R." continued to turn to the left towards and in front of the "Bessemer" sounded her whistle and reversed engines, then the "Gloria R." swung hard left and crossed directly in front of the "Bessemer's" path and while so crossing in front of the "Bessemer", the "Gloria R." crashed with her starboard side into the "Bessemer".

That the master and crew navigating the "Gloria R." were guilty of careless and negligent acts in that:

(1) They handled, operated and navigated the "Gloria R." so that said vessel swung to left across the bow of the "Bessemer" and continued swinging to left until collision occurred.

(2) They failed to keep an adequate lookout.

(3) They were running the "Gloria R." at an excessive speed.

That each and every of the aforesaid acts of negligence were direct and proximate causes of the collision alleged aforesaid.

VII.

That as a proximate result of said negligence of the master and crew of the "Gloria R.", the "Bessemer" was laid up for repairs from October 4, 1944 to on or about October 13, 1944, and during said time the vessel and its crew lost eight fishing days; that the loss of earnings proximately caused by said layup was as follows: \$500.00 loss of earnings sustained by the libelant, and \$1,250.00 loss of use of his sardine net; \$5,500.00 loss of earnings sustained by the crew; and \$750.00 loss of earnings sustained by the master.

VIII.

That all and singular the premises are true and within the maritime and admiralty jurisdiction of this Court. [78]

IX.

That respondent Van Camp Sea Food Company, Inc. does business in and has officers who reside in the Southern District of California, Central Division; that Gennaro DeLeva resides in the Southern District of California, Central Division.

Wherefore, libelant prays that process in due form of law according to the course and practice of admiralty issue against the respondents, citing them to appear and answer the allegations aforesaid; that the Court be pleased to decree to the libelant, on behalf of himself and the members of the crew of the "Bessemer", and against whomsoever of the respondents as the Court finds liable to the libelant, payment of the loss aforesaid in the sum of \$500.00 for loss of earnings of libelant, plus \$1,250.00

for loss of use of his sardine net; \$5,500.00 loss of earnings sustained by the crew; and \$750.00 loss of earnings sustained by the master; for costs of suit; and for such other relief as to the Court seems just.

HERBERT R. LANDE
Proctor for Libelant

[Verified.]

[Endorsed]: Filed Mar. 7, 1947. Edmund L. Smith,
Clerk. [79]

[Title of District Court and Cause]

EXCEPTIONS TO FIFTH AMENDED LIBEL

Comes now Van Camp Sea Food Company, Inc., a corporation, respondent above-named, and excepts to the Fifth Amended Libel, (sometimes referred to herein as "said libel") filed herein, as follows:

Excepts to the sufficiency of said libel and the whole thereof on the ground that the facts averred in said libel are insufficient to constitute a cause of action against this respondent.

Wherefore this respondent prays that its exceptions be sustained and that the said Fifth Amended Libel be dismissed as to this respondent.

MCCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Respondent, Van Camp Sea
Food Company, Inc. [80]

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF EXCEPTIONS

Libelant's sixth effort to state a cause of action has resulted in a pleading which again encounters the difficulties interposed by the 9th Circuit Court of Appeals in the case of

U. S. vs. Laffin (The Lydia) (C. C. A. 1928), 24
F. 2d 683, 1928 A. M. C. 700

which, as this court has pointed out, effectively precludes recovery by employees from their employer for detention damage. In Article I of the libel, libelant, in order to comply with the court's ruling that the pleading be full and complete, has set forth facts, the legal effect of which establishes the relationship of employer and employee between this respondent and the libelant himself and the crew of the Bessemer. We refer the court to the 9th Circuit Court of Appeals case of

Loe vs. Goldstein (C. C. A. 9th, 1939), 101 F.
2d 967, 1937 A. M. C. 627

and the case of

Cromwell vs. Slaney (C. C. A. 1st, 1933), 65 F.
2d 940, 1933 A. M. C. 1514.

In these two cases it is clearly established that the employer-employee relationship in a fisherman's lay agreement depends on whether or not the entire command and possession and consequent control over the vessel has been surrendered to the alleged charterer. The 1st Circuit Court of Appeals found in the latter case that the fisherman was an employee, not of the owner but of the Master, because entire operation of the vessel, in purchasing supplies for the voyage, determining where and

how long the vessel would fish, disposing of the catch, and settling of the bills, was under the sole control of the Master and the owner had no control whatsoever [81] over any operation. The 9th Circuit Court of Appeals in the Loe case rejected the theory urged here by libelant that the "fish boss" was charterer and owner pro haec vice. The court stated that retention by the general owner of any control over the vessel was incompatible with the existence of special ownership in the "charterer". Loe was in the same position with reference to the fish boat Norland as libelant is here with reference to the Bessemer. The court, in a rather complete opinion, indicates that Loe in acting as "fish boss" became an employee of the owner and in hiring the crew acted as agent of the owner. The court said that these crew-members were therefore employees of the owners, indirectly hired and fired by the owners through the agency of the Master; that in such case the owner would be liable for the negligent acts of their crew-member employees.

In the Fifth Amended Libel which, for the purposes of these exceptions must be taken to be true, we find the allegation that libelant nominated the Master who was "appointed" by the respondent. This is clearly an allegation that the owner retained control over the vessel because the Master was the owner's employee. At line 4, page 2, of Article I, appears the allegation, "The fish caught must be delivered to the respondent." This requirement makes the instant case even stronger than that before the 9th Circuit Court in *Loe vs. Goldstein* because there the owner had "nothing to do with its (the crew's) hiring, nothing to do with the fish after they are caught or (nothing to) say (as to) what price they should be

sold for or where they should be sold or anything else.” Article I continues with the allegation that respondent paid each crew man one share of the value of the catch based on \$22.00 per ton. There is no election or freedom from [82] choice on the part of this crew to take the fish where they please. They must deliver them to this respondent, their employer.

A further allegation appears in lines 7 to 10 of page 2, Article I, that libelant, the crew-members and the Master, were “carried on the books of account of the respondent as its employees and deductions from their wages were made by respondent for Social Security taxes and Withholding taxes.” This is squarely in line with the case of

O’Hara Vessels, Inc. v. Hasset (D. C. Mass.
(1942), 60 Fed. Supp. 672, 1945 A. M. C. 1108

which holds that fishermen on shares are employees. It is to be noted that the 9th Circuit Court of Appeals in the case of

Reskusich v. City of Avalon (C. C. A. 9th, 1946),
156 F. 2d 500, 1946 A. M. C. 1009

indicates that its attitude with reference to fishermen on shares is similar to that of the Massachusetts court on this question. Our Circuit Court of Appeals pointed out that fishermen’s shares are wages and that the Social Security tax and Withholding taxes were to be deducted by their employer because the fishermen’s share was a “fixed obligation of the employer though undetermined in amount.”

II.

Article II of the libel, in the light of the case of

Loe vs. Goldstein, *supra*

alleges that the crew-members and the Master were em-

ployees of respondent, Van Camp Sea Food Company, Inc.

III.

Article III of the libel is defective in view of

U. S. vs. Laffin (The Lydia), supra [83]

and the cases cited therein, which holds that the owners are the sole persons entitled to sue for the recovery of the proceeds of a voyage on a shares agreement. The crew-members, who are employees of Van Camp Sea Food Company, Inc., under the holding of the

Loe vs. Goldstein, supra

case, cannot improve their situation by suing in the name of this libelant, who under the same case is also an employee of this respondent.

IV.

Article IV is defective if either of the alternative allegations as to ownership is accepted. The libel alleges that (1) either the Gloria R was operated by Gennaro DeLeva as an employee of the Van Camp Sea Food Company, Inc., or (2) that she was operated by him as a charterer. Being contradictories these allegations cannot both be true, so we have to assume their correctness in the alternative.

In the first event, Van Camp Sea Food Company, Inc., is entitled to a dismissal by reason of the holding in

U. S. vs. Laffin, supra

because an employee cannot sue his employer under these circumstances.

There is no cause of action stated here nor can libelant state a cause of action for himself or the crew when

he pleads the details of this employment agreement with this respondent.

If the alternative allegation is accepted and it is assumed that Gennaro DeLeva is a "charterer", the crew of the Gloria R are employees of Gennaro DeLeva. The doctrine of respondeat superior does not apply and no cause of action is stated against Van Camp Sea Food Company, Inc. This respondent would thus be entitled to a dismissal because under this assumption these crew- [84] members are not alleged to be employees of the Van Camp Sea Food Company, Inc.

The objection that libelant does not have a cause of action for himself or for the crew (under The Lydia Case) is, of course, equally applicable to the alternative assumption.

V.

This Court has had presented to it, in the six libels in this case, in one form or another, all the possibilities of this case. Libelant's reluctance to take a position, and his subsequent changing of position is due to the fact that basically no cause of action exists. We appreciate that the Court has been liberal in allowing libelant ample latitude to plead. Certainly no objection can be made to this exercise of the Court's discretion.

If, however, libelant cannot state a cause of action, the Court is entitled to sustain these exceptions without leave to amend. And as to this respondent, libelant is unable to state a cause of action because of the dilemma presented: Either the fishermen on shares are employees of the boat owner in which event the case of The Lydia

(U. S. v. Laflin) precludes recovery; or they are employees of a bareboat charterer in which case the doctrine of respondeat superior, upon which libelant relies, is not applicable. In either event no cause of action against respondent, Van Camp Sea Food Company, Inc., can be presented.

We therefore urge the Court to exercise its discretion and make the final disposition referred to in

2 Benedict on Admiralty (6th Ed.), p. 472

“In respect of such (exceptions) as are sustained, the court either makes a final disposition, subject to the defeated party’s eventual right of appeal after a decree, or else orders the libelant to plead anew [85] or the respondent or claimant to answer further within such time and on such terms as the court may direct.”

This Court can and should sustain these exceptions without leave to amend.

Respectfully submitted,

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondent, Van Camp Sea
Food Company, Inc.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 10, 1947. Edmund L. Smith,
Clerk. [86]

[Title of District Court and Cause]

ANSWER TO FIFTH AMENDED LIBEL

To the Honorable the Judges of the United States District Court, Southern District of California, Central Division:

The Answer of Van Camp Sea Food Company, Inc., and Gennaro DeLeva, respondents herein, to the Fifth Amended Libel in personam of the libelant, (herein sometimes referred to as "said libel"), denies, admits and alleges as follows:

I.

Answering the allegations of Article I of said libel, respondents admits that at the time of the collision hereinafter alleged, respondent, Van Camp Sea Food Company, Inc., was the owner of the oil screw Bessemer, a fishing vessel; deny that libelant was in possession of said vessel in any capacity other than that of an employee of respondent, Van Camp Sea Food Company; admit that libelant engaged a crew but allege that, in so engaging a crew, libelant acted as the employee [90] or "fish boss" of respondent, Van Camp Sea Food Company, Inc.; admit that libelant nominated the master and that the said master was appointed by respondent and allege that said master thereupon became the employee of respondent, Van Camp Sea Food Company, Inc.; admit that the activities and conduct of the crew and master were subject to control of the libelant but allege that the right to said control of the crew and master remained in respondent, Van Camp Sea Food Company, Inc., and was at all times exercised by said respondent. Van Camp Sea Food Company, Inc., by and through libelant who at all times was

and remained its employee; allege that libelant was hired for the purpose of exercising such control; respondents admit that respondent, Van Camp Sea Food Company, Inc., retained two and three-fourths shares of the net proceeds of the catch of said vessel as its share and that the compensation of the employees of respondent, Van Camp Sea Food Company, Inc., for their services aboard said vessel were a total of sixteen shares of the said net value of the catch; respondents admit that the obligation of the employees of respondent, Van Camp Sea Food Company, Inc., aboard said fishing vessel Bessemer was to deliver all fish to respondent, Van Camp Sea Food Company, Inc., and to no other person, and that at the time mentioned in said libel, the value per ton of sardines was \$22.00. Respondents admit that libelant, crew members and master of said vessel were carried on the books of account of respondent, Van Camp Sea Food Company, Inc., as its employees and deductions from their wages were made by said respondent for Social Security taxes, and withholding taxes, for the reason that said libelant, crew members and master were actual and bona fide employees of respondent, Van Camp Sea Food Company, Inc. Respondents admit that libelant, as an employee of respondent, Van Camp Sea Food Company, Inc., was entitled to two and one-half shares for use of a [91] net which respondent, Van Camp Sea Food Company, Inc., is informed and verily believes was the personal property of libelant and is included in the sixteen aforementioned shares; except as herein specifically admitted, respondents deny each and every allegation of said Article.

II.

Answering the allegations of Article II, of said libel, respondents admit that libelant engaged certain persons

as crew of said vessel and that at the time of the collision said crew members were in the service of said vessel. Respondents admit that the crew members designated in such article are correctly described with the exception of Romolio Chigi, who is described in said Article as "Chigi Romolio" and Pete Barbieri, who was likewise a crew member but who is omitted from the enumeration of said crew members. Respondents allege that said crew members and master and libelant were employees of respondent, Van Camp Sea Food Company, Inc., that they were hired by libelant who had been hired by respondent, Van Camp Sea Food Company, Inc., as "fish boss" to whom was delegated the duty to hire a crew; that libelant acted as agent and employee of respondent, Van Camp Sea Food Company, Inc., in hiring said crew members and master as employees of respondent, Van Camp Sea Food Company, Inc.

III.

Answering the allegations of Article III, of said libel, respondents admit that libelant purports to sue for himself and on behalf of each and every of the crew of the said fish boat Bessemer, but respondents deny that libelant has any right to sue for himself or on behalf of such crew members or master of said vessel, or that any of the crew members or the master of said vessel have any right whatsoever to bring this action. [92]

IV.

Answering the allegations of Article IV, of said libel, respondents admit that at the time of the collision alleged in said libel, libelant was operating said vessel pursuant to an agreement with respondent, Van Camp Sea Food Company, Inc., and had taken said vessel to sea and was engaged in fishing operations for sardines in the waters

of the Pacific Ocean off the Southern California Coast; respondents allege, however, that said agreement created the relationship of employer and employee between libelant and respondent, Van Camp Sea Food Company, Inc., and that in so proceeding and engaging in the said fishing operations, libelant did so as such employee of respondent, Van Camp Sea Food Company, Inc., and that the master and crew of said vessel were likewise employees of the Van Camp Sea Food Company, Inc., at all times therein mentioned.

V.

Answering the allegations of Article V, of said libel, respondents admit that respondent, Van Camp Sea Food Company, Inc., was the owner of the oil screw fishing vessel Gloria R and that respondent had employed Gennaro DeLeva as "fish boss" to operate said vessel, to hire a crew for respondent, Van Camp Sea Food Company, Inc., for said vessel, that the relationship between the respondent, Van Camp Sea Food Company, Inc., the said vessel Gloria R, respondent Gennaro DeLeva, and the crew of said vessel Gloria R, was identical with the relationship of the various parties to the vessel Bessemer and that said relationship was in accordance with the usual custom and practice in the sardine fishing industry. Respondents deny that respondent Gennara DeLeva was a demise or bare-boat charterer or chartered the vessel in any manner whatsoever, but allege that said vessel Gloria R was being operated on shares in the same manner as said vessel Bessemer was being operated, to-wit, that the "fish boss", [93] master and crew were employees of the boat-owner who were paid a percentage of the net proceeds of the voyage as their wages. Respondents admit further that said master and crew of the Gloria R were

acting within the scope and course of their employment as employees of respondent, Van Camp Sea Food Company, Inc. Respondents allege that the allegations as to the employer-employee relationship between the "fish boss", master and crew members of the Gloria R are based upon information, belief and custom in the sardine fishing industry, but that if the Court finds that said circumstances under and by virtue of which said fishing vessels Bessemer and Gloria R were being operated does not create the relationship of master and servant between said crews and the owner of said vessels, said respondents beg leave to amend this libel accordingly in this respect.

VI.

Answering the allegations of Article VI, of said libel, respondents allege that the said allegations are in a large part untrue and falsely alleged, and respondents therefore deny each and all of the said allegations therein contained, except insofar as they may hereinafter be admitted to be true and upon information and belief respondents allege the circumstances of the said collision to be as follows:

The fishing vessel Gloria R on October 4, 1944, was engaged in fishing operations in the vicinity of the east end of Catalina Island. At about 9:15 P. M., about four miles north of the easterly end of said Island and while said vessel Gloria R was searching for fish, she was proceeding in a generally northerly direction and observed the Bessemer proceeding in a generally easterly direction off the Gloria R's port bow. Said Bessemer at said time had the Gloria R on her starboard hand in a crossing situation, [94] and was in the position of the burdened vessel required to keep out of the way of the Gloria R and said Gloria R had the said Bessemer on her port hand and was the privileged vessel obligated to obtain her

course and speed. Said Bessemer in violation of her duty to keep out of the way of said vessel Gloria R, crossed ahead of said Gloria R, whereupon the said Bessemer altered her course to starboard and made a turn of 180 degrees until she was headed in a generally westerly direction. Said Bessemer then headed toward the starboard side of said Gloria R. The master of said Gloria R when said vessels were in extremis and in danger of collision attempted to avoid said Bessemer by making a turn to port but said Bessemer continued to move forward despite a belated effort to avoid collision by putting her engines fully astern and the bow of said Bessemer collided with the starboard side of said Gloria R aft of amidships. Further answering the allegations of said Article VI, respondents deny that the master and crew of the Gloria R, or any of them, were guilty of careless and negligent or careless acts, as alleged, or in any respect, deny that they handled, operated and navigated the said Gloria R so that said vessel swung to left across the bow of the Bessemer and continued swinging to left until the collision occurred, except insofar as said turn to the left was made in extremis and in an effort to avoid a collision which was impending because of the negligent navigation of the said Bessemer; respondents deny that said master and/or crew of the Gloria R failed to keep an adequate lookout; respondents deny that the master and/or crew of said Gloria R were running the said Gloria R at an excessive speed. Respondents deny that the master and crew and master or crew of the Gloria R, or any of them, were negligent in any respect whatsoever and deny that such alleged negligence was the direct and/or proximate cause [95] or causes of the said collision, but on the contrary allege that such collision was due solely to negligence and

fault of the Bessemer, her master and crew, and libelant, in this connection in the following respects:

- 1) The officers and crew of said Bessemer were not properly stationed and were not attending to their duties;
- 2) The said Bessemer and her navigators failed to observe the Gloria R and failed to avoid running into her;
- 3) The said Bessemer failed to exhibit lights as prescribed by Article 9 of the International Rules for the Prevention of Collisions;
- 4) The said Bessemer, after having crossed the course of the Gloria R from port to starboard, negligently failed to maintain her course but put her rudder hard right, and turned sharply toward and into the said Gloria R;
- 5) The said master and crew of the Bessemer were negligent and failed to exercise due care and prudence to avoid colliding with the Gloria R under the special circumstances then and there existing; and
- 6) The said Bessemer failed to keep out of the way of the said Gloria R, as required by Article 19 of the International Rules for the Prevention of Collisions, but on the contrary, crossed ahead of said Gloria R and turned back into her.

Respondents allege that said negligent acts of the master and crew of the Bessemer were the direct, sole and proximate cause of said collision between said vessels.

VII.

Answering the allegations of Article VII, of said libel, [96] respondents admit that the said vessel was laid up

for repairs for a period of eight fishing days from October 4, 1944, to October 13, 1944, but deny that said layup during said period was due to negligence of the master and/or crew of the said Gloria R; respondents are without information as to the loss of earnings sustained by libelant, the master and crew of said vessel and do therefore deny that libelant sustained loss in the amount of \$500.00; deny that libelant sustained loss of use of his sardine net in the amount of \$1,250.00; deny that the crew sustained loss of earnings of \$5,500.00 and deny that the master sustained loss of earnings of \$750.00, or that said persons sustained loss or losses in any other amount, and demand strict proof by libelant as to the alleged items of loss or damage, if any.

VIII.

Answering the allegations of Article VIII, of said libel, respondents deny that any of the premises of said libel are true except as herein specifically admitted, but admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

IX.

Answering the allegations of Article IX, of said libel, respondents admit that respondent, Van Camp Sea Food Company, Inc., does business in and has officers who reside in the Southern District of California, and admit that Gennaro DeLeva resides in said District.

X.

And further answering said Fifth Amended Libel, respondents allege that the facts averred in said libel are insufficient to constitute a cause of action against these respondents.

Wherefore respondents pray that the said Fifth Amended Libel [97] and this suit be dismissed hence with costs to the respondents, and that respondents have such other and further relief as shall be deemed just and proper in the premises.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondents [98]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 28, 1947. Edmund L. Smith,
Clerk. [99]

[Title of District Court and Cause]

ORDER SHORTENING TIME FOR HEARING OF
MOTIONS

Good cause appearing, It Is Ordered that the annexed motions be heard on Thursday the 30th day of October, 1947, at 10:00 a. m., or as soon thereafter as counsel can be heard, prior to trial.

It is Further Ordered that the time provided by Local Rule 3(b) be shortened accordingly, and that copy of said motions, copy of notice of motions, respondents' memorandum of points and authorities and copy of this order be served forthwith upon Herbert R. Lande, Proctor for Libellant.

Dated October 28, 1947.

PEIRSON M. HALL

United States District Judge [100]

[Title of District Court and Cause]

NOTICE OF MOTIONS

To Herbert R. Lande, Proctor for Libelant:

Please Take Notice that on Thursday, the 30th day of October, 1947 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, in the courtroom of Honorable Peirson M. Hall, United States District Judge for the Southern District of California at the Federal Building, City of Los Angeles, State of California, the attached motions will be presented.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Respondents [101]

[Title of District Court and Cause]

MOTIONS TO DISMISS

Now Come Van Camp Sea Food Company, Inc., and Gennaro DiLeva, respondents in the above entitled action by their proctors, McCutchen, Thomas, Matthew, Griffiths & Greene, and move this Court as follows:

I.

Respondent Van Camp Sea Food Company, Inc. moves to dismiss the libel on the grounds that:

1. There has been a complete trial as to respondent Van Camp Sea Food Company, Inc., both parties having rested; said trial culminated in the memorandum opinion of the trial court that this action had not been commenced against the proper respondents.

2. Respondent Van Camp Sea Food Company, Inc. should not be harassed by being compelled to relitigate. [102]

3. Libelant has had his day in court as to respondent Van Camp Sea Food Company, Inc.

4. The libel, as amended to conform to proof, does not state a cause of action against respondent Van Camp Sea Food Company, Inc.

5. Libelant does not have the capacity to sue either for himself or representing the crew.

6. Instead of conforming to proof, an entirely new issue and an entirely new party is brought into the case, by the Fifth Amended Libel.

7. Respondent Van Camp Sea Food Company, Inc. should not be compelled to incur the expense and inconvenience of an additional trial, because of the fact that the prior action was brought against an improper respondent.

II.

Respondent Gennaro DeLeva moves to dismiss the libel as to him on the grounds that:

1. He is improperly joined as a respondent in this case.

2. No proper procedural steps were taken to join him as a party respondent.

3. He will be prejudiced by being compelled to come into a case after completion of the trial thereof.

4. If libelant has a cause of action against respondent Gennaro DeLeva, his proper remedy is by commencing a separate action.

5. No cause of action against respondent Gennaro DeLeva is stated in libelant's Fifth Amended Libel.

6. Libelant does not state facts in the Fifth Amended [103] Libel showing that he has capacity to sue for himself or on behalf of the balance of the crew.

III.

Respondents Van Camp Sea Food Company, Inc. and Gennaro DeLeva move that the order of this Court dated September 8, 1947 setting this matter for trial be vacated; said motion is based on the records, files and proceedings in this case.

Dated October 28, 1947.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Respondents [104]

* * * * *

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 28, 1947. Edmund L. Smith,
Clerk. [107]

[Minutes: Thursday, October 30, 1947]

Present: The Honorable Peirson M. Hall, District Judge.

For trial and for hearing on motion to dismiss, pursuant to notice thereof filed Oct. 25, 1947; H. R. Lande, Esq., present for libelant; G. E. Toner, Esq., present for Van Camp Sea Food Co.;

Attorney Toner makes a statement in support of motion to dismiss and Attorney Lande makes a statement in opposition.

The Court states that the memorandum of opinion of Judge Harrison was made during a vacation of the trial which had occurred to that date, and that thereafter a new libel was filed with the amended pleadings and new parties, and that libel is now before the Court for trial de novo.

The Court denies the exceptions and motion to dismiss. Attorney Lande makes opening statement.

Witness DiLeva is called, sworn, and testifies for libelant, and Lbt's Ex. 1 offered and marked for ident.

At 11:20 A. M. court recesses. At 11:30 A. M. court reconvenes herein and all being present as before, Witness DiLeva resumes the stand and testifies further.

Salvatore Carnevale is called, sworn, and testifies for libelant.

Jack Olsen is called, sworn, and testifies for libelant.

At 12:07 P. M. court recesses to 2 P. M. At 2:12 P. M. court reconvenes herein, and on motion of Attorney Lande, Lbt's Ex. 2 and 3 are admitted in evidence. Libelant rests.

On motion of Attorney Toner, it is ordered that this complaint is hereby dismissed as to Defendant Gennaro DiLeva. [108]

Anthony DiLeva is called, sworn, and testifies for respondent Van Camp Sea Food Co., and Respondents' Ex. A is admitted in evidence.

Jacob Pugliese is called, sworn, and testifies for the respondents.

Gennaro DiLeva and Nicola Curci, respectively, are called, sworn, and testify for libelant.

Mike Liddi is sworn and acts as in interpreter of the Italian language.

At 3:12 P. M. court recesses. At 3:25 P. M. court reconvenes herein and all being present as before, Biago Cummo and Fenton K. Gertsle, respectively, are called, and testify for libelant; and Respondent's Ex. B is admitted in evidence, following which counsel stipulate that pages 101 to 108 of the transcript from previous trial may be deemed to have been read into the record and marked Libelant's Ex. 4 and admitted in evidence.

Both sides rest. Attorney Lande waives opening statement. Attorney Toner makes a statement.

The Court finds in favor of the libelant and fixes damages in the sum of \$4,752.00, less operating expenses, unemployment taxes, and withholding taxes, and that counsel for the libelant prepare Findings and Judgment accordingly. [109]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 28th day of October, 1947, in the above court, Honorable Peirson Hall, United States District Judge presiding; Herbert R. Lande appearing as proctor for the libelant, and McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black and George E. Toner, appearing as proctors for the respondents; and evidence oral and documentary having been taken and received, and the cause submitted for decision, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

That it is true that prior to and on the 4th day of October, 1944, the respondent Van Camp Sea Food Company, Inc., a corporation, was the owner of the oil screw "Bessemer", a fishing [110] vessel; that said respondent employed the libelant and a crew of twelve fishermen to operate said vessel in the commercial fisheries; that the master of said vessel was employed and appointed by the said respondent; that of the proceeds of the fish caught by said crew and vessel, after deduction of fuel and dockage, the respondent was entitled to $3\frac{1}{4}$ shares, less $\frac{1}{2}$ share given as bonus to master; the owner of the net, libelant Salvatore DiLeva, was entitled to $2\frac{1}{2}$ shares; and each of the 13 crew members were entitled to one share thereof.

II.

That it is true that the said respondent Van Camp Sea Food Company, Inc., employed on said vessel "Bessemer" the following crew members, and that at the time of the collision referred to hereafter, said fishermen were in the service of said vessel: Ivan Jurgev, Mario DiLeva, Mike DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolino, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, Pietro Colombo, Salvatore DiLeva and Anthony DiLeva as master; that libelant sues on behalf of himself and each and every of the said crew.

III.

That it is true that prior to and at the time of the collision referred to hereafter, the master and crew of the "Bessemer" had taken said vessel to sea and were engaged in fishing operations for sardines in waters off the Southern California coast.

IV.

That it is true that prior to and at the time of the collision referred to hereafter, the respondent Van Camp Sea Food Company, Inc., was the owner of the oil screw fishing vessel called the "Gloria R." and that said respondent employed the master and crew thereof; that said master and crew were, at the time of the collision mentioned hereafter, acting within the scope [111] and course of their said employment.

V.

That it is true that on or about October 4, 1944, at or about 9:15 P. M., the "Bessemer" was engaged in fishing operations off Catalina Island; that the "Bessemer" was proceeding with all running lights burning; that at said time, the "Bessemer" was approximately two to three miles off the east end of Avalon, Catalina Island; that at said time the vessel was ready to make a set with the net but had not commenced to make the set nor lowered the net to the skiff; that at said time the vessel was in a school of fish (sardines); that prior to the collision, the vessel was moving ahead slowly at a speed of from one to one and one-half knots per hour, headed in a westerly direction and that at said time, the "Gloria R." was headed in an easterly direction and running at a speed of approximately eight knots per hour; that thereupon the "Gloria R." turned sharply to the left and crossed the bow of the "Bessemer"; that while so crossing the bow of the "Bessemer", the right side of the "Gloria R." smashed into the bow of the "Bessemer" and damaged her; that prior to the collision the "Gloria R." did not slacken her speed; that prior to the collision the "Bessemer" threw her engines and propeller into reverse in an endeavor to avoid the collision; that prior to the collision, the

"Bessemer" was observed by the master of the "Gloria R."; that the said collision was directly and proximately caused by the negligence of the master and crew of the "Gloria R." in the operation and navigation of said vessel so that it negligently turned and crossed the bow of the "Bessemer" when in the positions aforesaid.

VI.

That it is true that as a proximate result of the said negligence of the master and crew of the "Gloria R.", the "Bessemer" was laid up for repairs from October 4, 1944, to [112] October 13, 1944, inclusive; that during said time, the master and crew of the "Bessemer" were unable to fish; that the loss of earnings proximately caused by said layup was the sum of \$239.22 to each of the twelve crew men; the sum of \$363.53 to the master, Anthony DiLeva; and the sum of \$621.65 to the owner of the net on the "Bessemer", Salvatore DiLeva.

VII.

That it is true that the respondent Van Camp Sea Food Company, Inc., has offices and does business within the Southern District of California, Central Division.

CONCLUSIONS OF LAW

I.

That the respondent Van Camp Sea Food Company, Inc., is liable for the negligence of the master and crew of the "Gloria R." and that the said collision with the "Bessemer" was directly and proximately caused by the said negligence of the master and crew of the "Gloria R."

II.

That the libelant is entitled to recover from the respondent Van Camp Sea Food Company, Inc., the following sums for and on behalf of himself and the following crew members, as damages for loss of earnings:

| | |
|------------------------------------|--------------|
| Ivan Jurgev | \$239.22 |
| Mario DiLeva | 239.22 |
| Mike DiLeva | 239.22 |
| Jack Olsen..... | 239.22 |
| Marino Transatti..... | 239.22 |
| Angelo Castagnola..... | 239.22 |
| Chigi Romolino | 239.22 |
| Salvatore Carnevale | 239.22 |
| Matteo Bologna..... | 239.22 [113] |
| Pasquale Guglielmo | \$239.22 |
| Pietro Colombo | 239.22 |
| Salvatore DiLeva..... | 239.22 |
| Anthony DiLeva (master)..... | 363.53 |
| Salvatore DiLeva (net shares)..... | 621.65 |

III.

That libelant is entitled to recover his costs herein.

Dated: Dec. 9th, 1947.

PEIRSON M. HALL

United States District Judge [114]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 9, 1947. Edmund L. Smith,
Clerk. [115]

In the United States District Court
Southern District of California

Central Division

In Admiralty No. 4630 P. H.

SALVATORE DiLEVA,

Libelant,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation,
and GENNARO DeLEVA,

Respondents.

JUDGMENT

The above entitled cause came on regularly for trial on the 28th day of October, 1947, in the above entitled court, Honorable Peirson Hall, United States District Judge presiding; Herbert R. Lande appearing as proctor for the libelant, and McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black and George E. Toner, appearing as proctors for the respondent Van Camp Sea Food Company, Inc.; and evidence, oral and documentary having been taken and received, the cause submitted for decision, and written findings of fact and conclusions of law having heretofore been made and filed:

It is therefore Ordered, Adjudged and Decreed that the libelant do have and recover from the respondent Van Camp Sea Food Company, Inc., for and on behalf of the following persons the sums set after their names: [116]

| | |
|------------------------------------|----------|
| Ivan Jurgev | \$239.22 |
| Mario DiLeva | 239.22 |
| Mike DiLeva | 239.22 |
| Jack Olsen | 239.22 |
| Marino Transatti | 239.22 |
| Angelo Castagnola..... | 239.22 |
| Chici Romolino | 239.22 |
| Salvatore Carnevale..... | 239.22 |
| Matteo Bologna..... | 239.22 |
| Pasquale Guglielmo..... | 239.22 |
| Pietro Colombo | 239.22 |
| Salvatore DiLeva..... | 239.22 |
| Anthony DiLeva (master)..... | 363.53 |
| Salvatore DiLeva (net shares)..... | 621.65 |

It is further Ordered, Adjudged and Decreed that the respondent Van Camp Sea Food Company, Inc., deduct from said crew members recovery, the lawful social security taxes and withholding taxes according to each of said crew members rate of exemption, except the recovery of Salvatore DiLeva for the loss of use of his fish net.

It is further Adjudged that libelant recover his costs in the sum of \$48.80.

Dated: November 9th, 1947.

PEIRSON M. HALL

United States District Judge

Judgment entered Dec. 9, 1947. Docketed Dec. 9, 1947. C. O. Book 47, page 370. Edmund L. Smith, Clerk. [117]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 9, 1947. Edmund L. Smith, Clerk. [118]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the
United States District Court, Southern District of
California, Central Division:

Van Camp Sea Food Company, Inc., your petitioner, one of the respondents herein hereby prays that it may be permitted to take an appeal from the final decree (designated as "Judgment"), entered herein on the 9th day of December, 1947, and from each and every part of said decree. Said petitioner does further pray that it may be permitted to take an appeal from the order entered herein on the 30th day of October, 1947, on the Civil Docket of said Court and in the minutes of said Court, wherein it was ordered [119] that libellant recover the sum of Four Thousand Seven Hundred Fifty-two Dollars (\$4,752.00) less operating expenses, unemployment taxes and withholding taxes.

Your petitioner also desires that the supersedeas bond filed herewith in this Court be approved by this Court, and that execution of the aforesaid final decree and the aforesaid order be stayed, pending the determination of the appeal herein.

Dated at Los Angeles, California, this day
of January, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Respondent Van Camp Sea
Food Company, Inc.

Service of the within Petition for Appeal and receipt of a copy is admitted this 29 day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [120]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL

The petition of Van Camp Sea Food Company, Inc. for an appeal from the final decree entered in the above-entitled cause on the 9th day of December, 1947, and from the order entered in the above-entitled cause on October 30, 1947, in the Civil Docket and in the minutes of said Court, wherein it was ordered that libelants recover the sum of Four Thousand Seven Hundred and Fifty-two Dollars (\$4,752.00) less operating expenses, unemployment taxes and withholding taxes, is hereby granted, and the appeal is allowed.

It Is Further Ordered that a certified copy of the record herein be forthwith transmitted to the United States Circuit Court [121] of Appeals for the Ninth Circuit.

It Is Further Ordered, that the supersedeas bond filed herein be, and the same is hereby approved, and that execution of the aforesaid final decree and of the aforesaid order, be, and is hereby stayed, pending the determination of the appeal herein.

Dated, at Los Angeles, California, this 29th day of January, 1948.

PAUL J. McCORMICK
United States District Judge

Service of the within Order Allowing Appeal and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [122]

[Title of District Court and Cause]

NOTICE OF APPEAL

Please Take Notice that Van Camp Sea Food Company, Inc., one of the respondents in the above-entitled case, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 9th day of December, 1947, and from each and every part of said judgment; and from the order entered herein on October 30, 1947, in the Civil Docket of said Court and in the minutes of said Court wherein it was ordered that libelants recover the sum of Four Thousand Seven Hundred and Fifty-two Dollars (\$4,752.00) less operating expenses, unemployment taxes and withholding taxes, plus costs, and from each and every part of said order. [123]

Dated this day of January, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Respondent Van Camp Sea
Food Company, Inc.

To: Edmund L. Smith, United States District Court:

To: Herbert R. Lande, 413 West Seventh Street, San
Pedro, California, Proctors for Libelants:

Service of the within Notice of Appeal and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith,
Clerk. [124]

[Title of District Court and Cause]

ASSIGNMENT OF ERROR

I.

The Court erred in finding that it is true that the Bessemer was proceeding, at the time of the collision referred to herein, with all running lights burning.

II.

The Court erred in finding that it is true that at the time of the collision the Bessemer was ready to make a set but had not commenced to make the set nor lowered the net to the skiff.

III.

The Court erred in finding that the Gloria R was negligent [125] or that her master or her crew was negligent in their operation or navigation of said vessel at or prior to the time of said collision between the Bessemer and the Gloria R., in turning and crossing the bow of the Bessemer or in any other respect.

IV.

The Court erred in finding that the collision between the Bessemer and the Gloria R was directly and proximately or in any other manner caused by negligence of the Gloria R.

V.

The Court erred in finding that as a proximate result of such alleged negligence, the Bessemer was laid up for repairs.

VI.

The Court erred in finding that the Bessemer was laid up for repairs for the period from October 4, 1944 to October 13, 1944 inclusive.

VII.

The Court erred in finding that the loss of earnings, proximately caused by the layup of the Bessemer, was the sum of \$239.22 to each of twelve crew men, the sum of \$363.53 to the master, Anthony DiLeva and the sum of \$621.65 to the owner of the net on the Bessemer, Salvatore DiLeva.

VIII.

The Court erred in denying respondent Van Camp Sea Food Company, Inc.'s motion to dismiss this action against this respondent.

IX.

The Court erred in not finding that the libelant's fifth amended libel did not state a cause of action against respondent Van Camp Sea Food Company, Inc.

X.

The Court erred in not dismissing this action as to respondent Van Camp Sea Food Company, Inc., at the termination of first trial [126] of this cause.

XI.

The Court erred in permitting a second trial of the same matter as to respondent Van Camp Sea Food Company, Inc., after a complete prior trial upon the same issues.

XII.

The Court erred in proceeding to a second trial upon the identical issues before the Court in the prior trial to allow libelants to join an additional party not before the Court at the time of the first trial.

XIII.

The Court erred in allowing the second trial to proceed without proper order allowing addition of a new party.

XIV.

The Court erred in regarding the memorandum opinion of the District Judge who presided at the first trial, as an order vacating the prior proceedings, when such memorandum opinion purported merely to allow additional proceedings as to the legal effect of an alleged charter party, and a determination of the status of the fishermen aboard both fishing vessels.

XV.

The Court erred in overruling respondent's exceptions to libellant's Fifth Amended Libel.

XVI.

The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc. is liable for negligence of the master and crew of the Gloria R and that the collision between said vessel and the Bessemer was directly and proximately caused by negligence of the master and crew of the Gloria R.

XVII.

The Court erred in its conclusion of law that libellant [127] is entitled to recover from respondent Van Camp Sea Food Company, Inc. the following sums on behalf

of himself and the following crew members as damages and loss of earnings:

| | |
|-------------------------------|----------|
| Ivan Jurjev | \$239.22 |
| Mario DiLeva | 239.22 |
| Mike DiLeva | 239.22 |
| Jack Olsen | 239.22 |
| Marino Transatti | 239.22 |
| Angelo Castagnola | 239.22 |
| Chigi Romolio | 239.22 |
| Salvatore Carnevale | 239.22 |
| Matteo Bologna | 239.22 |
| Pasquale Guglielmo | 239.22 |
| Pietro Colombo | 239.22 |
| Salvatore DiLeva | 239.22 |
| Anthony DiLeva (master) | 363.53 |
| Salvatore DiLeva (net shares) | 621.65 |

XVIII.

The Court erred in its conclusion of law that libelant is entitled to recover his costs.

Dated January 29, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondent Van Camp Sea
Food Company, Inc.

Service of the within Assignment of Error and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Landt, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith,
Clerk. [128]

In the United States District Court
Southern District of California
Central Division

In Admiralty No. 4630 B. H.

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA, MIKE DiLEVA, SALVATORE DiLEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNEVALE, MATTEO BOLOGNA, PASQUALE GUGLIELMO, and PIETRO COLOMBO,

Libelants,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation, and GENNARO DiLEVA,

Respondents.

SUPERSEDEAS BOND

Know All Men By These Presents that Fireman's Fund Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do a surety business in the State of California, is held and firmly bound unto Salvatore DiLeva in the full and just sum of Three Thousand Eight Hundred Fifty-five and 82/100 Dollars (\$3,855.82) to be paid to said Salvatore DiLeva or his duly designated attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves and administrators, successors and assigns, jointly and severally by these presents. [129]

Whereas, lately at a District Court of the United States for the Southern District of California, Central Division,

in a suit pending in said Court between Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, and Pietro Colombo, libelants against Van Camp Sea Food Company, Inc., and Gennaro DiLeva as respondents, a decree was entered against said respondent Van Camp Sea Food Company, Inc., and the said respondent having filed in said Court a notice of appeal and a petition for the allowance of an appeal, to reverse the said decree in the aforesaid suit, the aforesaid appeal being directed to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the Condition of the Above Obligation Is Such that if the said respondent shall prosecute the said appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full any modification of the judgment and such costs, interests and damages that the appeal Court may adjudge and award if said respondent fails to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated this 29th day of January, 1948.

(Seal)

FIREMAN'S FUND INDEMNITY
COMPANY

By L. H. Schwobeda

Its Attorney in Fact

The premium charged for this bond is \$77.12 per annum.

State of California

County of Los Angeles—ss.

On this 29th day of January, 1948, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. H. Schwobeda, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal)

M. E. BEETH

Notary Public in and for the County of Los Angeles,
State of California

My commission expires March 24, 1949.

Approved this 29th day of January, 1948. Herbert R. Lande, Proctor for Libelants and Appellees [130]

Recommended for approval as provided in Rule 8. McCutchen, Thomas, Matthew, Griffiths & Greene, Harold A. Black, George E. Toner, Proctors for Respondents and Appellants.

I hereby approve the foregoing bond this 29th day of January, 1948.

PAUL J. McCORMICK

United States District Judge

Service of the within Supersedeas Bond and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [131]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 142, inclusive, contain the original citation and full, true and correct copies of Libel in Personam for Damages Due to Collision; Respondent's Exceptions to the Libel; First Amended Libel in Personam for Damages Due to Collision; Exceptions to First Amended Libel; Second Amended Libel in Personam for Damages Due to Collision; Exceptions to Second Amended Libel; Answer of Respondent to Second Amended Libel; Memorandum; Third Amended Libel; Exceptions of Respondent Van Camp Sea Food Co., Inc. to Third Amended Libel; Fourth Amended Libel; Stipulation and Order for Dismissal as to Gennaro DiLeva et al.; Exceptions to Fourth Amended Libel; Fifth Amended Libel; Exceptions to Fifth Amended Libel of Van Camp Sea Food Company, Inc., a corporation; Exceptions to Fifth Amended Libel of Van Camp Sea Food Company, Inc. and Gennaro DeLeva; Answer to Fifth Amended Libel; Motions to Dis-

miss, Notice of Motions and Order Shortening Time; Minute Order Entered October 30, 1947; Findings of Fact and Conclusions of Law; Judgment; Petition for Appeal; Order Allowing Appeal; Notice of Appeal; Assignment of Error; Supersedeas Bond; Praecipe for Apostles; Stipulation and Order for Transmission of Original Exhibits and Docket Entries which, together with copy of Reporter's Transcript of Proceedings on May 16, 1946; April 7, 1947; June 30, 1947; September 8, 1947 and October 28 and 30, 1947 and original Libelant's Exhibits 1, 2, 3 and Respondent's Exhibits A, B, C, and D at the hearing on May 16, 1947 and original Libelants' Exhibits 1, 2, 3 and 4 and Respondent's Exhibits A and B at the hearing on October 30, 1947, transmitted herewith, constitute the Apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing Apostles amount to \$16.45 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 5 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 30, 1947

Appearances:

For the Libelant: Herbert L. Lande, Esq., 413 West Seventh Street, San Pedro, California.

For the Respondents: McCutchen, Thomas, Matthew, Griffiths and Greene, 704 Roosevelt Building, Los Angeles 14, California; and Harold A. Black, Esq., and George E. Toner, Esq. [3*]

Los Angeles, California, October 30, 1947

10:00 o'clock A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

No. 4630-PH, Civil; Salvatore Di Leva v. Van Camp Sea Food Company, Inc., et al. for trial.

Mr. Lande: Ready for libelant, your Honor.

Mr. Toner: Ready for the respondents.

The Court: Proceed.

Mr. Toner: If the Court please, may we have a ruling on our motions prior to trial?

The Court: Which motions?

Mr. Toner: On the motions to dismiss on the ground, first, that there has been a complete trial here as to the respondent Van Camp Sea Food Company and that it is inequitable to put Van Camp Sea Food Company through another trial of this case. We had the first trial which

*Page number appearing at top of page of original Reporter's Transcript.

terminated in a memorandum opinion by Judge Harrison who said that he figured that the libelant here had sued the wrong parties.

The Court: I explained your memorandum that you filed yesterday and your motion to dismiss. It appears to be based on identically the same ground as that set forth in the exceptions to the fifth amended libel filed on March 10, 1947, as well as exceptions to the fifth amended libel filed April 28, 1947. [14]

Mr. Toner: In part, yes, if the Court please.

There is also the additional factor that we did not previously urge the fact that the Van Camp Sea Food Company had been through a trial of this matter. The previous exceptions were solely on the merits.

The Court: As to the exceptions covered in your previous exception, I think that I must regard them as the law of the case.

Mr. Toner: I believe that is correct.

The Court: The docket shows that the March 10th exceptions were overruled on April 7, 1947.

Mr. Toner: Those were the exceptions of the Van Camp Sea Food Company, and there has been no ruling—

The Court: And on April 28, 1947 the exceptions were filed on behalf of Van Camp Sea Food Company and Gennaro de Leva to the fifth amended libel, where the same points were raised as in the Van Camp Sea Food exceptions which were overruled on April 4, 1947, and in connection with these exceptions I do not find any record of a hearing except that the docket shows that on June 16, 1947 the case was continued for setting, and it was transferred to be on June 30th.

Therefore the only thing I can do is presume that the exceptions were overruled, otherwise it would not have

been continued for setting. I think that everything you have raised in that exception must also be regarded as the law of [15] the case and settled.

Now you say there is an additional point?

Mr. Toner: Yes, in that if the libelant sues Van Camp Sea Food Company, as they have here, alone and they have gone through a trial—

The Court: There was no judgment.

Mr. Toner: That is correct, there was no judgment, but there is this memorandum opinion.

Now the law of the case, as I see it, may well be taken to follow the memorandum opinion in that the Court said that the alleged charterer may have been the proper defendant

The Court: But the Court did not make that finding. The Court says that it has been intimated that the Gloria R was being operated under a similar agreement. If such is true, the charterers of the Gloria R would be the proper respondents. He does not make any finding to that effect, so I do not believe that the trial could be said to be concluded when it did not eventuate in a judgment. And, as indicated by the memorandum opinion, he is allowing the libelants to file another amended libel.

Mr. Toner: To conform to proof.

The Court: Under the circumstances, I shall allow the libelant to file an amended libel. The Court did not say anything about conforming to proof, because he states here that it is only intimated that something is true. [16]

Mr. Toner: After a trial, if the Court please, I would think it quite irregular and surprising to bring in a new defendant. A sues B and then the Court goes through the trial and A says, well, I should have had C in here.

The Court: Is it your position that any statute of limitations has run against Gennaro de Leva?

Mr. Toner: No.

The Court: Very well, then.

Mr. Toner: At the end of the case you have the defense of laches, but in any event the statutory period has not run in the California statute of limitations at the time this process was served. So that point is not involved.

The Court: If that is the case, then I cannot see why during the trial—and this was during the trial—the Court cannot permit the bringing in of additional parties.

Mr. Toner: I think it was after the trial. Both parties had rested and the case was submitted.

The Court: Is it your position that the trial is still going on and all it needs is a decision on the case as it was rested?

Mr. Toner: Well, frankly, I don't know. This is a rather unusual procedure and, to use the Court's words in another case, I am a little at sea in this admiralty case. But it seems to me very surprising that after the libelants have rested and the case is submitted that the libelants now are [17] able to bring in a new party. Don't they have their recourse against the new party if they have a claim against them, which I think they don't, but don't they have the right to bring in an entirely new action? Don't they have the duty to bring in an entirely new action? The same point came up in the other case.

The Court: That is not what Judge Harrison held.

Mr. Toner: There was no specific holding, your Honor.

The Court: But Judge Harrison said that he would allow them to file an amended complaint, and if it is true

that they are a charterer then they should be proper parties, so they have filed an amended complaint and brought this other party in. Now it may be that the sole issue upon which evidence should be taken—by the way, I understand there is a transcript of the testimony?

Mr. Toner: There is.

The Court: —the sole issue that should be tried at this time is whether or not the Gloria R was a chartered vessel or if they were employees of Van Camp Sea Food Company.

Mr. Toner: That is certainly an issue before the Court, but I don't believe that it is the sole issue.

The Court: What are the other issues?

Mr. Toner: I don't see how Gennaro de Leva can be bound in what happened in a trial against an entirely different defendant. He wasn't a party to the case at the time his previ- [18] ous testimony was taken.

The same identical point was raised in the Southern District of New York in this Connett case, 43 F. Supp. 245, and the Court there said:

“Midway in the trial”—(that evidently is before the parties had rested)—“the libelant moved to bring in Gallagher Bros. Sand & Gravel Co. Inc., as respondent. The motion is denied. Suit against the Gallagher Corporation, as charterer of the libelant's barge, was always open to the libelant. His motion now we regard as untimely and in any event we see no prejudice in its denial.”

Isn't the same argument that was used in that case midway in the trial so much more available to us where the parties here have rested and the case is submitted?

Mr. Lande: May I make a sketch on the board to show the proceedings of this litigation and how the parties happened to come into it?

The Court: I think I know pretty well how that comes out. What I am thinking about is this, that Judge Harrison's opinion in that case, memorandum or whatever you call it, is the law of the case as far as it goes. He said they could file and should file an amended libel. They have filed an amended libel wherein new parties have been brought in, and [19] it looks to be like I have to try the whole case over again.

Mr. Lande: That is my opinion.

If I may say, your Honor, here we started out I think with 13 libelants—that was on the Bessemer—and they sued the Van Camp Sea Food Company.

The first exception came in and we alleged that the Gloria R was a boat owned and operated by the Van Camp Sea Food Company. They said, well, you have to name who it was operated by. All right. So we said it was operated by de Leva.

Then the exception came in, well, di Leva and these 13 libelants all work for Van Camp Sea Food and therefore under their theory of law there could be no recovery.

They also said that the 13 libelants couldn't sue in their own names, that they had to sue in the master's name. So we filed an amended libel there that put the master as the libelant against Van Camp Sea Food and we went to trial on that libel with the master against Van Camp as the respondent.

The Court: Was that the first amended libel?

Mr. Lande: Yes, that is the one we went to trial on, whether it was the first or second one.

The Court: There are six here. This is the fifth amended libel that we are down to. I thought you went to trial on the fourth amended libel.

Mr. Toner: We went to trial on the first amended libel. [20]

The Court: When did these amended libels come in?

Mr. Toner: They came in after the trial of the case, where the libelant was attempting to state a case and conform to proof, and we have had three libels since then in which the libelant has been unable to state a cause of action.

Mr. Lande: Regardless of which libel it was, it went to trial on the case of the master against the Van Camp Sea Food, and during the trial Judge Harrison said, well, it may be that this boat, the Gloria R, was under charter to de Leva instead of an employee. If it was under charter, he said, and Van Camp Sea Food had nothing to do with the boat, they just rented it and had no control over it, it was just a bare boat charter, then the suit should be against the operators of it, the actual operators, the captain of the charterer, of the Gloria R, and that was their contention.

So to give them a day in court on that contention, he said, all right, we will have an amended libel filed and name one or the other or both. And at that time the respondent came in and said, well, as far as Gennaro de Leva is concerned, he has come in for the first time and that issue hasn't been litigated, and when he is in court we have an entirely new trial as to him, and inasmuch as Judge Harrison has tried the case and found against him on the issue of liability we don't think it is proper for him to try it again, or to get a fair trial, so it should be transferred to an- [21] other judge. That is

why we are here. But the issue was then whether or not di Leva was an independent charterer.

Now when they come into your court here they say that di Leva is our employee, switching back to their original position.

Mr. Toner: If the Court please, I want to take exception to that. We have never shifted our position in this case at all. These men have been acknowledged to be employees right straight down the line, as far as we are concerned.

Mr. Lande: All right. We won't go into that point. But anyway, regardless of how we got here, we are now at the position where the respondent says that di Leva was the employee of Van Camp Sea Food and we are suing through our master as our representative, suing Van Camp Sea Food for the torts of its agent. It is just that simple a case. The master, as representative of his crew, sues the Van Camp Sea Food for the tort of its agent de Leva.

Mr. Toner: In the memorandum opinion, if the Court please, Judge Harrison said that he would regard *The Lydia* (24 F. (2d) 683) as controlling, in which case it was held that the captain and the crew did not have authority to sue.

The Court: I just finished reading that case but I do not know that I read it the same way.

I will deny your exceptions on the ground that the memorandum opinion of Judge Harrison was a vacation of the trial [22] which had occurred to that date; that thereafter a new complaint was filed, with amended pleadings and new parties, and that that complaint is now before the Court for trial de novo.

I will deny the exceptions on the other grounds which you have mentioned and which have heretofore been

covered in the exceptions to the libels which were denied by Judge Harrison.

I hope I have made my ruling clear, whether it is right or wrong.

Mr. Toner: I don't necessarily feel that way about it, your Honor, but I do want a definite ruling.

The Court: Is my ruling clear to you?

Mr. Toner: Yes, I understand it.

The Court: Is it clear to you?

Mr. Lande: Yes, your Honor.

The Court: In other words, we are starting out on the commencement of a trial, all of the proceedings heretofore had are vacated, there is a new complaint before the Court and the exceptions are overruled.

Mr. Toner: May I ask this, are we going to have any further rule of the case arising out of Judge Harrison's memorandum opinion?

The Court: I do not know. I will have to wait and see as the issues present themselves to me. What he has done, in my judgment, is that he just vacated the trial. [23]

Mr. Toner: I believe that is correct.

The Court: I think he vacated the trial and said, well, you start over again, and they started over again with a new complaint and brought in a new party.

Mr. Toner: I think that that is vacated for all purposes so that we don't have to run into the rule of the case any further. If it is a trial de novo it should be entirely de novo.

The Court: This is presently my view, that in vacating the trial and permitting an amended complaint, he vacated all of the rulings which he had made up to that portion. In other words, he said, I will let the party file

an amended complaint and start over again. They have started over again. Now I regard his subsequent rulings on exceptions to libels, to the amended libels filed after that, as binding now upon me as the rule of the case.

Mr. Toner: Yes, I understand.

The Court: Therefore I will overrule your present exceptions which are based on those same grounds.

Mr. Toner: That is correct.

Mr. Lande: If I may interrupt the Court, I think the Court is falling into error, for this reason, that at the time these exceptions were filed to the fifth amended libel we have had no hearing on those, your Honor.

The Court: Yes. [24]

Mr. Lande: No—I beg your pardon—unless I am greatly in error. The exceptions were filed with the answer.

Mr. Toner: Those were the exceptions of Gennaro de Leva. There was a ruling on Van Camp's exceptions.

The Court: That is right. I have them right here.

Mr. Toner: I believe it was on the 7th of June, if I am not mistaken.

The Court: Here is the fifth amended libel. It was filed March 7th. Exceptions to the fifth amended libel were filed on behalf of Van Camp Sea Food Company on March 10th and were overruled April 7th. Further exceptions to the fifth amended libel were filed April 28, 1947 on behalf of Van Camp Sea Food and Gennaro de Leva. The record shows that they were on the calendar on the 16th of June. The minutes do not show any specific action by the Court as to them, except that the Court continued the case for setting. Now the case is not ready for setting until the exceptions have been disposed of. Therefore I must regard the record as show-

ing that these exceptions were overruled by Judge Harrison before the case was subsequently transferred to me on June 30th.

Mr. Toner: They were overruled by implication then.

The Court: No, I have to go further than that. I have to hold that they were overruled because the case would not have been continued for setting if they had not been overruled. [25]

Mr. Toner: Unless error was committed.

The Court: So while your answer was filed at the same time, I must regard the record as reflecting the exceptions filed at that time on behalf of both respondents to have been overruled, and then the case was continued for setting and transferred to be and has been set for trial.

Mr. Toner: In any event, the Court has today overruled these exceptions, so I believe that that is corrected if there was an error.

The Court: As to your exceptions today, you have stated that they contain the same grounds that were heretofore covered in your previous exceptions which, as I have indicated, have been ruled upon by Judge Harrison on two different dates, except the one point that there was a complete trial, and as to that exception I am holding that there was not a complete trial, the the order of Judge Harrison contained in his memorandum opinion filed August 8, 1946 was a vacation of the trial, of the proceedings had in the trial, so that now there is a new trial.

Proceed.

Mr. Lande: Mr. Di Leva, will you take the stand, please?

ANTHONY DI LEVA

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name? [26]

The Witness: Anthony Di Leva.

The Clerk: Your address?

The Witness: 884, 18th Street, San Pedro.

Mr. Toner: Pardon me, if the Court please. One thing more. As is the usual admiralty case, I assume that the issue of liability is now before the Court and that the issue of damages will be deferred?

The Court: Yes, I think we should probably settle the question of liability.

Mr. Toner: Because I think there is no reason for bothering the Court with an involved trial on the issue of damages where, if such necessity arises, the Court can send the case out for a reference to a commissioner.

Mr. Lande: We would rather have the Court determine it. We think it is a simple matter.

The Court: I do not think we can send it to a commissioner without the consent of both parties.

Mr. Toner: In admiralty you can make an interlocutory decree.

Mr. Lande: At any rate, the issue of damages I don't think will be that complicated. I believe the Court can settle the matter.

The Court: In view of the objection, I think that probably the evidence had better go in on the whole matter.

Let me see, now, you represent both respondents? [27]

Mr. Toner: That is correct.

(Testimony of Anthony Di Leva)

Mr. Lande: One "Di Leva" is D-i Leva and the other is D-e Leva.

Mr. Toner: That is not correct.

Mr. Lande: Which one is which?

Mr. Toner: In this case, as we had in the previous case, there is going to be some confusion. The gentleman who is on the stand is Anthony Di Leva, master of the Bessemer. He has no middle name.

The gentleman back here is Anthony Di Leva, who was on the Gloria R. He likewise has no middle name.

The Court: Is your name spelled D-i L-e-v-a?

The Witness: That is right.

The Court: And the libelant's name, Salvatore Di Leva, is listed as D-i L-e-v-a.

Mr. Toner: That is this Anthony Di Leva's father.

The Court: And Gennaro is spelled D-e L-e-v-a.

Mr. Toner: D-i.

The Court: And the other Anthony Di Leva?

Mr. Toner: Is likewise D-i L-e-v-a. The two Anthonys are cousins.

The Court: It is pleaded here as D-e L-e-v-a.

Mr. Toner: That is incorrect.

The Court: Do you have any objection to amending it?

Mr. Toner: No. [28]

The Court: On motion of libelant's counsel the pleadings will be amended so as to show the respondent Gennaro D-i L-e-v-a.

Do you have any charts here that you want to have marked for identification in advance?

Mr. Lande: No, your Honor. We will draw our diagrams as we go along.

(Testimony of Anthony Di Leva)

The Court: Very well.

Mr. Lande: Your Honor, may I ask counsel one thing? I think it would be well if counsel stated the position of the respondents, to wit, if Anthony Di Leva and his crew of the Gloria R are employees of Van Camp Sea Food or are they not.

The Court: I thought he had stated that in the answer.

Mr. Toner: I have stated that through six libels, and they are employees and they are not charterers.

The Court: That is the way I read your answer to the fifth libel.

Mr. Toner: Yes, exactly.

The Court: That they are and were at the time employees.

Mr. Toner: Yes.

I should also like, if the Court please, to get some expression of opinion from the libelant as to what his theory of the case is as to whether these men are employees or charterers. We have been trying to pin them down through these six libels and sometimes they are employees and some- [29] times they are charterers.

The Court: I think it might be well for libelant's counsel to make an opening statement with relation to that point. There is no pretrial memorandum filed by libelant's counsel.

Mr. Lande: There were so many memorandums in the case, your Honor, I didn't want to encumber the record any further.

The Court: I know there are a great many, but there have been so many that I cannot take it for granted that

(Testimony of Anthony Di Leva)

any previous memorandum will apply to the present state of the case.

Mr. Lande: Our position is as stated in the libel, that the libelant and the crew of the Bessemer were in possession of this vessel under an oral agreement with the respondent whereby they were given possession of the vessel for the sardine season then in progress.

The Court: Is it your legal position that they were charterers of the vessel or employees of the vessel?

Mr. Lande: We would not like to put them in airtight compartments known as charterers or employees. We would like to present the entire factual picture to you and to deduct from that the legal rights of the parties.

The Court: You must have some idea in your mind in advance about the ultimate position you want the judge to take.

Mr. Lande: Grossly speaking, your Honor, and not wanting [30] to put them in an airtight compartment whereby all the common law incidents of that compartment are taken as the law of the case, but using the expression "grossly" it is our position that they were employees, that they had this boat from the Van Camp Sea Food Company and they were under an obligation to deliver their fish to that cannery, that the master of the vessel was actually appointed by the cannery although nominated by the men on the Bessemer. At the same time they were out there operating on the high seas as an independent unit and when they were smacked into by another independent unit of the Van Camp Sea Food Company that they are entitled to recover damages, and that the common law rule of fellow-servant does not

(Testimony of Anthony Di Leva)

apply because they were two separate enterprises with one joint management and control over the actual navigation of the vessel.

Now there is only one case we have found that has ever been cited, the case of the *Petrel*, an English case, and they have held that the common law rule of fellow-servant does not bar recovery.

Mr. Toner: If the Court please, it might simplify matters if during the recess the Court will look at *Loe v. Goldstein*, which is 101 F. (2d) 967, in which the Ninth Circuit was faced with the problem of an injury by a fisherman on this type of venture and the court—

The Court: On another vessel? [31]

Mr. Toner: No. It was a claim by a fisherman against the owner of the vessel he was working on. The discussion of whether it was a chartered vessel or whether this man was an employee was gone into very thoroughly by the Ninth Circuit in that case.

The Court: Counsel, I understand your position to concede that the right of an employee does not exist to sue his master-servant rule generally.

Mr. Toner: Yes.

The Court: But that where, as in admiralty, you have one common employer and they start out on two separate ventures, as in two separate vessels, and the vessels after they get upon the seas are in complete control of the master of the vessel that a different rule applies.

Mr. Lande: Precisely, your Honor.

Mr. Toner: The fellow-servant rule does not apply in that case. We are making no issue of the fellow-servant rule.

The Court: It does not apply in this case?

(Testimony of Anthony Di Leva)

Mr. Toner: No. That has been well worked out in the past century or so.

The Court: Even though they have these common owners?

Mr. Toner: Yes.

The Court: Very well.

Mr. Toner: The question at issue though in this particular case is the converse of this *Loe v. Goldstein*. In that [32] case the owner, in defense of the personal injury claim, said, no, I am not in charge of this vessel at all, it is in the hands of a charterer, and said that this man is not a charterer, that I am working for the owner.

Now in this particular case we are saying that these men are all employees and up to now the libelant hasn't definitely stated any conclusion as to whether they are employees or charterers.

The Court: He has now stated that they are employees.

Mr. Toner: Very well.

Mr. Lande: Grossly speaking.

Mr. Toner: Now, wait a minute. I don't know what an employee "grossly speaking" is.

The Court: I suppose maybe we will find out, or make an attempt to.

Proceed.

Direct Examination

By Mr. Lande:

Q. Mr. Di Leva, at the time of the collision with the *Gloria R.*, were you the master of the *Bessemer*?

A. I was.

Q. How many men were in your crew on that night?

A. Thirteen.

(Testimony of Anthony Di Leva)

Q. And what type of operation was your vessel engaged in? [33] A. Sardine fishing.

Q. When had the season started?

A. October 4th, I think it was; first night out.

Q. That was the beginning of the dark of the moon?

A. Beginning of the dark.

Q. Was this the first night out?

A. Yes, it was.

Q. What year was this?

A. 1944; October 4th.

Q. What type of vessel were you operating?

A. Well, it is called a purse seiner.

Q. I will show you this model—by the way, your Honor, I don't wish this model to be introduced in evidence—is this approximately the type of vessel that you were operating?

A. Yes, it is. We don't use this purse seine. There is two types of nets. Ours is a lomparo, on which we don't use no table, and this is a purse seine where they use a table.

The Court: You just pile yours on the deck?

The Witness: That is right. We didn't have no top house here. (Indicating on model.)

By Mr. Lande:

Q. Now on the night of October 4th were you looking for fish on Catalina Island?

A. Yes, we were. [34]

Q. On the board here I have a piece of paper tacked up, and we will say the top of this paper represents north, this is south, east and west, and this end of the

(Testimony of Anthony Di Leva)

body here is Catalina Island. Were you fishing off of Catalina Island that night?

A. Yes, we were.

Q. Will you step up to the board, please?

This mark I have here represents the east end of Catalina Island. Is that approximately what the land mass there looks like? A. Yes.

The Court: The east end would be the lower end of Catalina Island?

The Witness: Yes.

Mr. Lande: Where Avalon is.

The Witness: This is the east end. You know where Avalon is at? It is on the other end of the island.

By Mr. Lande:

Q. Do you want to draw it?

A. (Drawing on blackboard.) Say this is the east end here; here is Avalon Bay right in here. (Indicating.)

The Court: That is on a smaller scale than counsel drew.

Mr. Lande: The collision took place some miles off the east end of the island, so the exact terrain is not material. [35]

Q. As you came up to that end of Catalina Island, were you looking for fish? A. Yes

Q. Did you find a school of fish?

A. Yes, we did.

Q. Tell the Court what happened after that.

A. We found a school of fish in between, say, the east end of Avalon, about three miles out, I guess, and we found the fish here (indicating), and we were heading out in this position here, and we come up on them and made a couple of circles clockwise on the fish because

the moon was up. I don't know if your Honor is familiar with the procedure of fishing, but when the moon is up they are hard to see, the water don't fire, there is no phosphorus, so you listen to the fish.

The Court: I thought you said you were fishing in the dark of the moon.

The Witness: It was the dark of the moon, but the moon was out already, the moon came up early that night, and when the moon is out you usually look around for an hour or two and you can hear them flipping. In other words, they are breaking water. And the amount of fish flipping, that is how you determine how much fish there usually is, and you take a chance and see how much you get out of it.

In this instance the moon was up already and we could [36] just barely see them but we could hear the fish breaking the water.

So to make sure we made a couple of circles and stopped, and then listened to them again and we would find them over here, the first time, so we made another circle to make sure, to get the biggest amount of them. Then all of a sudden the fish were traveling, they happened to be traveling east, the next time we found them over here (indicating), so we figured we would make a counter-circle counter-clockwise, this way here (indicating).

By Mr. Lande:

Q. You have it going clockwise, to the right.

A. I meant clockwise. We made two counter-clockwise, then the third one we made like this. (Indicating.)

Q. Clockwise to the right?

A. To the right, yes, to get on the fish right away.

The Court: Did you put out your nets?

(Testimony of Anthony Di Leva)

The Witness: No, we didn't. We were all ready to lower the nets, we had the fellows in the skiff, the end of the net tied to the skiff.

By Mr. Lande:

Q. About how fast were you going at that time?

A. We were only going with the propeller about a mile or a mile and a half, that is all, with the clutch in. That is the position we were in when the Gloria R come in front of [37] us and struck us.

Mr. Lande: Your Honor, may I on the diagram draw a rectangle with the bow to represent his boat?

The Court: Why not let him represent it?

Mr. Lande: I am afraid he will draw it out of scale.

Mr. Toner: I would much rather have the witness do it.

The Court: I would not say that that was a scale map you have there.

By Mr. Lande:

Q. Will you draw a little ship-like rectangle to show the Bessemer?

A. I am not an artist—

The Court: Just draw arrows the way you were going first.

The Witness: (Drawing on blackboard) We went twice that way.

The Court: Then you turned around and went clockwise the other way?

The Witness: (Drawing on blackboard)

By Mr. Lande:

Q. During this time, what lights did you have on your vessel?

A. Red and green lights.

(Testimony of Anthony Di Leva)

Q. Will you step up to the model and show the Court where your running lights were? [38]

A. This is the red light, this is the port side; this is the green light, the starboard side.

Q. While you were in this operation of setting over the fish, did you see the Gloria R at any time?

A. Yes, I did. They were north of us.

Q. For the Gloria R use this red crayon, please, and designate on that diagram.

A. (Drawing on blackboard) They were about in this position here.

Q. About how far away from you were they?

A. Oh, they were, I would say, two, three miles away.

Q. Did you see them after you saw them in that position?

A. I seen them all the time. I was listening for the fish and I observed his course. We made a circle, he was heading toward the Island, and while we were circling the fish his course was to the east end all the time, the east end of the Island.

Then as we started to make the clockwise turn he headed out in this direction here.

The Court: Put arrows there.

The Witness: (Drawing on blackboard)

By Mr. Lande:

Q. You have a position marked here. When he was in that position did you observe his lights? [39]

A. Yes, I did. I seen his red light all the time here.

Q. Just a minute. When you say "all the time"—may I mark these positions A, B, C and D, your Honor?

The Court: Very well.

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. Now in position C and D, which of his lights did you see?

A. I seen the red light.

Q. Did you see his green light?

A. No, I didn't.

Q. What happened after you saw him in position D?

A. When I seen him in position D we were just slowing down, just completing our circle.

Q. Will you put an arrow where you were at that time?

A. (Drawing on blackboard)

The Court: Mark his positions 1, 2, 3 and 4, something like that.

Mr. Lande: All right.

The Court: No. 1 when he started, 2 is where he made the clockwise turn, 3 is down there where he has the boat out.

Mr. Lande: Yes.

The Court: So you were in position 3 when he was at D?

The Witness: That is right.

The Court: All right. [40]

By Mr. Lande:

Q. Now which light on your vessel was to the light of the Gloria R? A. Our red light.

Q. In other words, you were red to red?

A. Red to red; yes.

Q. What does red to red mean?

A. Red to red, that is navigation, when you go red to red or green to green that is to avoid accidents. In other words, I don't know if I can explain it so well—

(Testimony of Anthony Di Leva)

The Court: You mean you should continue going that way?

The Witness: Continue your course until you are clear, red to red, green to green.

The Court: Each vessel is supposed to—

The Witness: Keep their course until they are clear of each other.

By Mr. Lande:

Q. Now will you return to the blackboard. What happened to the Gloria R from the position D?

A. We finished our circle to go on the fish here, and we were just going, as I say, with the propeller, going about a mile, and then all of a sudden—

Q. When you draw the Gloria R, use the red crayon.

A. We were just completing our circle here. All of a sudden—I was looking at them all the time—I seen his [41] red and green. In other words, that showed that he was turning.

The Court: Mark it on that map there. He turned north then?

The Witness: Yes.

The Court: That is position E?

The Witness: E.

Then after, all of a sudden, I seen him turning.

The Court: In the meantime you proceeded in your circle?

The Witness: In the circle. We completed the circle. We were showing our red light and he was showing his red and green.

Then all of a sudden I seen him in this position here. (Indicating) All of a sudden he turned his green lights toward us. Then I hollered at my father to back up

(Testimony of Anthony Di Leva)

because we were going slow ahead, to go full speed reverse as we thought we would clear him. I don't know what happened. All of a sudden he turned, he changed his course to cut across our bow, and he come like this right straight in front of our bow (indicating), and all of a sudden I guess he thought he would clear us by turning to port, and the bow turned to port but the stern clipped our bow like that (indicating), just shoved our bow in.

Mr. Lande: May I mark the point of collision F?

The Court: Yes. [42]

What rate was he going?

The Witness: He was going about 8 knots. He never slowed down. He just kept going, that is all. We hollered at him but it happened so darn fast after he turned full speed that I thought if we backed up full speed that we could—

The Court: You did put your motor in reverse?

The Witness: We were in reverse, but we still had a little forward motion. But still it happened so fast that when he turned over to port the vessel—you know how it moves, this way here—his stern pushed our bow out. He hit us in the bow.

The Court: He turned sharp to port.

The Witness: He turned sharp over and thought he would clear us, I guess, and he hit our bow.

Mr. Lande: Will you resume the stand, please?

Q. What happened after the collision?

A. We stopped and we hollered at him, and he stopped, and he seen we were leaking water. There was a dead calm, and the damage was about two or three feet above the water line, and we thought we could make it

(Testimony of Anthony Di Leva)

easy in—we had a big pump—so we kept pumping it out and we made it in all right.

The Court: Into where?

The Witness: San Pedro.

The Court: You did not fish any more? [43]

The Witness: No, sir.

The Court: Did you pull your net in?

The Witness: We hadn't lowered the net, your Honor. We were just ready to. We were all ready to lower it.

By Mr. Lande:

Q. How long was your vessel laid up for repairs?

A. About 11 days.

Q. During that time the sardine fishing was in progress?

A. Yes, it was.

Q. Did you see the other sardine vessels of like size and type as yours come into the Harbor?

A. Yes, they were all coming in. They were coming in all loaded.

Q. What types of load did they have on board?

A. They had a lot of full loads. It was very good that season.

Q. That week you missed was very good fishing?

A. Yes, we did.

Mr. Toner: If the Court please, I would like to object to the last question and answer and move that the answer and question be stricken because I don't believe that this witness was qualified properly to testify on the subject.

The Court: I do not think it makes much difference because "very good fishing" does not mean much to me. [44]

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. Tell the Court—you saw these other fishing boats come in? A. Yes, we did.

Q. They were loaded with sardines?

A. Every day.

Q. How many tons of fish does your vessel carry?

A. A full load, about 100 ton.

Q. What was the price of sardines at that time?

A. \$22 a ton.

Q. But for this accident—

The Court: How long does it take you to get—well these other boats you said came in, how long were they out fishing?

The Witness: Over night, your Honor.

The Court: Over night, sardine fishing.

By Mr. Lande:

Q. They were fishing locally for sardines?

A. Locally.

The Court: Were there any other fishing boats in this immediate area?

The Witness: No. I think we were the only two in that area at that time.

The Court: Do you know whether or not any other boats got into that same school of fish? [45]

The Witness: No, we didn't.

The Court: Did the Gloria R play out her nets and fish?

A. No, she came in.

The Court: Is she a sardine boat?

The Witness: She is.

The Court: Was she injured?

(Testimony of Anthony Di Leva)

The Witness: Well, no, just the guard was smashed—not smashed, it was just dented where it smashed our bow. You could see our bow was—your Honor, when a boat hits anything headon you are going to push that bow in, that bow is going to go in, but if anything gives it a sideswipe this bow is going to be pushed towards where it is swiped.

The Court: Yes.

The Witness: This is the way our bow was pushed, slanted to starboard.

The Court: Where was the hole?

The Witness: The hole was right about there (indicating).

The Court: Right in the bow?

The Witness: No right where the guard hit us, in the bow. The bowstep was pushed over.

The Court: How big was the hole?

The Witness: Well, the whole stem had to be renewed, all up and down.

The Court: So the leakage came from the removal of the [46] stem?

The Witness: That is right.

By Mr. Lande:

Q. Assume now that this is the Gloria R, what part of the Gloria R hit you?

A. Right aft the rigging, right here. (Indicating) When he turned like this, this part here just pushed our bow out. (Indicating)

The Court: How big was his vessel?

The Witness: It was just about the same sized vessel.

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. How many foot boat is yours?

A. About 73.

Q. What tonnage is your boat?

A. Fifty-five gross tonnage.

Q. Gross or net? A. I think it is net.

Mr. Lande: All right. You may cross-examine.

Just a minute. Your Honor, I believe I should go into the question—we have put the evidence in now for the collision. Would the Court like to hear the testimony as to who he was working for and what his arrangement was?

The Court: I do not know. It is your lawsuit.

By Mr. Lande:

Q. Mr. Di Leva, when did you first go on this boat as [47] captain?

A. The previous year—no, more than that—about '41.

Q. Who owned the vessel at that time?

A. Van Camp.

Q. Did you and your father have a charter with them?

A. Yes, we did.

Q. There was a written charter at that time?

A. Yes, sir.

Mr. Toner: Just a minute, if the Court please. I would like to object to the question and move that the answer be stricken because the proper foundation for such an answer has not been laid.

The Court: Did you have a charter, a written charter?

The Witness: Yes.

(Testimony of Anthony Di Leva)

The Court: I suppose he is going to produce the charter.

Mr. Lande: It is in evidence, your Honor.

The Court: It isn't in evidence now because all of the previous proceedings have been vacated.

By Mr. Lande:

Q. I will show you this document entitled "Charter Party," and ask you if you recognize the signatures thereon.

Mr. Toner: If the Court please, I would like to object to the introduction of this document without having this witness properly qualified as having seen the document or know- [48] ing anything about it.

The Court: I understand that is what he is doing.

Mr. Lande: That is what I understood.

Q. Have you seen this document before?

A. Yes, sir.

Q. Do you recognize the signatures of Mr. Gillis and that of your father? A. Yes, I do.

Q. Was there any document such as this executed between you and your father and the Van Camp Sea Food Company after this was executed? A. No.

Q. That is the only one?

A. That is the only one; yes.

Mr. Lande: May this be introduced for the purpose of identification only, your Honor?

The Court: It will be marked for identification.

The Clerk: Libelant's Exhibit No. 1 for identification.

(The document referred to was marked Libelant's Exhibit No. 1 for identification.)

[LIBELANTS' EXHIBIT NO. 1—Identification]

CHARTER PARTY

This Charter Party, made this 11th day of September, 1941, by and between Van Camp Sea Food Company, Inc., hereinafter referred to as the Owner, and Salvatore Di Leva, hereinafter referred to as Charterer;

Witnesseth:

That the Owner hereby agrees to let and the Charterer agrees to hire the Oil Screw Fishing Boat 'Bessemer' from the time of delivery hereof by the Owner to the Charterer and continuing thereafter until the first day of October, 1942, upon the terms and conditions herein set forth:

1. The Charterer agrees that he has examined the said Oil Screw 'Bessemer' and knows the condition thereof and he admits, acknowledges and agrees that said vessel is in good and seaworthy condition and is suitable for the fishing trade in which he will be engaged, and that all her machinery and gear are in good running condition and repair. The said vessel will be used in the fishing trade in the waters immediately adjacent to San Pedro and usually fished by vessels fishing therefrom, and all fish caught by said vessel or by the use thereof shall be delivered and sold by the Charterer to the Owner. The Owner shall pay to the Charterer the market price for any fish accepted by it.

2. The Charterer shall provide and pay for all provisions, consular shipping and discharge fees and for all

(Libelants' Exhibit No. 1—Identification)

necessary fishing equipment. The Charterer shall furnish and maintain in an efficient state a net or nets suitable for the Southern California fishery in which the vessel is to engage, namely, tuna, mackerel and sardine. The Charterer shall provide and pay for all fuel, lubricating oil, water, port charges and all other matters and things required in the efficient operation of the said vessel.

3. The Owner will provide and pay for hull insurance on the vessel and protection and indemnity insurance in the usual form and upon the Owner's fleet policy. Failure to keep the said vessel insured shall not constitute a breach of this Charter Party nor shall damages be allowed therefor. The loss of the said vessel or such a partial loss as will incapacitate the vessel from use for a period of longer than thirty (30) days shall terminate this Charter.

4. Neither the Owner or the Charterer shall make any allowance for fuel oil or surplus supplies now on the vessel or which may be thereon at the termination of this Charter.

5. The net proceeds earned by the said vessel computed according to the usual custom in the port of San Pedro for fishing vessels of this size and type operating therefrom, shall be divided into $18\frac{3}{4}$ shares. Three ~~and one-half~~ (3) shares from said $18\frac{3}{4}$ shares shall be paid by the Charterer to the Owner for the use and hire of the said vessel; the remaining shares shall be divided among the crew, the master and owner of the net, in full com-

(Libelants' Exhibit No. 1—Identification)

pensation for the use of the net and the services of the members of the crew. Said charter hire shall be paid immediately after the settlement made by the Charterer with his crew for the computation of the shares. The Charterer shall employ all of the crew of the said vessel, including the captain and engineer, but it is understood that the Charterer shall be and act as Master of the vessel and shall receive as his compensation a sum equivalent to $1\frac{1}{4}$ shares which shall not, however, be paid by the Owner or out of the boat's share of the earnings. The Charterer shall provide a competent engineer to handle the machinery of the said vessel and the Owner shall have the right to require the immediate removal and discharge of any engineer employed by the Charterer who may be unsatisfactory to the Owner. The Mast Man will receive $\frac{1}{4}$ of a share extra.

6. The Owner is negotiating for the purchase of the said vessel from its present owner and in the event the vessel should be lost or damaged so that it cannot be repaired within sixty (60) days or in the event for any reason the Owner does not obtain title to said vessel, then and in that event this Charter shall terminate and be of no effect for any purpose.

7. The Charterer will keep and maintain the said vessel and her hull and machinery in good condition, reasonable wear and tear excepted; provided, however, that if any major repairs or overhauling are necessary during the term of the charter, said major repairs or overhaul shall

(Libelants' Exhibit No. 1—Identification)

be paid for by the Owner, it being the intent of this agreement that the Charterer shall provide and pay for the usual maintenance work done on vessels in the trade by members of the crew.

8. Neither party shall be liable to the other for any loss of time or other damage, other than damage to the vessel or machinery, caused by the loss of use of the vessel by any reason whatsoever, including defects to hull or machinery. Neither party shall be liable for any loss occasioned by acts of God, enemies, restraint of Princes, Rulers or People, and all danger and acts of the seas and errors of navigation.

9. The Charterer agrees to abide by all the laws, rules and regulations of the United States and the State of California in the operation and use of said vessel, and that he will not permit said vessel to be used or operated in any waters which are closed to vessels of the type or using the gear as this vessel.

10. The Owner may terminate this charter in the event the Charterer, or any member of the crew of the *New Roma*, brings any action or suit against Louis Di Meglio or any other boat owner delivering fish to the Owner, or brings any action in rem against any vessel delivering fish to the Owner.

11. Neither the Charterer nor any master, engineer, or any other person employed by him, shall have any power or authority to bind the vessel or the Owner by way of maritime lien or otherwise upon any contractual obligation

(Libelants' Exhibit No. 1—Identification)

or otherwise, either for the purchase of necessary supplies or for any other purpose.

12. Should any dispute arise between the parties hereto the matter shall be submitted to the arbitration of three persons, one to be selected by the Owner, one by the Charterer and the two thus selected to select a third, and the decision of a majority of the three shall be final and binding upon the parties hereto.

In Witness Whereof, the parties herto have hereunto set their hands the day and year first above written.

VAN CAMP SEA FOOD COMPANY, INC.

By M. Gillis

(Owner)

Salvatore Di Leva

(Charterer)

No. 4360-BH adm. Libs.' Exhibit No. 3. Filed May 16, 1946. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Case No. 4630-PH. Di Leva vs. Van Camp. Libelants' Exhibit No. 1. Date Oct. 30, 1947. No. 1 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

By Mr. Lande:

Q. For subsequent seasons for sardines and for fishing other types of fish, you never had any other type of written agreement with Van Camp? A. No. [49]

Mr. Toner: I object to the question as leading.

The Court: It is leading, but he has answered it.

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. Now during the sardine season in question here, that is, the one beginning in October 1944, was there any written agreement between you and Van Camp?

A. No, there wasn't.

The Court: Just a moment now. On this Exhibit 1, you took the boat out on or about the date which it bears and continued to operate it for the term prescribed in there until the 1st of October, 1942, is that right?

The Witness: We did.

The Court: Did you subsequently take the boat out and do the same things you did under this charter?

The Witness: Yes.

The Court: And receive the same share?

The Witness: Same thing; yes, all the time.

The Court: All the way through?

The Witness: All the way through.

The Court: With the Van Camp Sea Food Company?

The Witness: Yes.

The Court: And continually up to the date of the accident?

The Witness: Yes, sir; we did.

The Court: All right. [50]

By Mr. Lande:

Q. During the time you had the vessel, whereabouts were you to deliver your fish?

A. Van Camp Sea Food Company.

Q. Who gave you checks in payment of your shares?

A. Van Camp Sea Food Company.

Q. Did Van Camp Sea Food Company deduct from your checks the social security amounts?

A. Yes, they did.

(Testimony of Anthony Di Leva)

Q. Who put you on the vessel as master?

A. Mr. Gillis.

Q. Of Van Camp Sea Food Company?

A. Van Camp Sea Food Company; yes.

Mr. Lande: You may cross-examine.

Cross-Examination

By Mr. Toner:

Q. Tony, how long have you been fishing?

A. About 12 years steady; off and on about 15 or 16 years.

Q. How old are you now?

A. I am 27.

Q. Are you familiar with fishermen's customs in the Bay?

A. With all the fishermen's customs, I am familiar.

Q. In this area? [51] A. I am.

Q. Will you show the Court, using the model, where the lights are put on when you are on fish?

A. There would be some argument about that.

Q. Where on the model, or in the literature?

A. When you are on fish?

Q. Yes.

A. Well, when you are on fish you usually don't put any lights, just when you are lowering.

Q. Just when you are what? A. Go ahead.

Q. What was the last thing you said?

A. There is no lights when you are on the fish.

Q. There are red lights on the mast aren't there?

A. There is red and white.

Q. Will you describe the red lights on the mast, where they are? Point them out.

(Testimony of Anthony Di Leva)

A. There is a red light and a white light. There is a running light and a white light on top when you are running, and there is a red light when you are going to lower the net in the water.

Q. Where on the model is the red light?

A. Right above the white.

Q. You put that on when you are going to lower the net in the water? [52]

A. That is right.

The Court: That is at the top of your mast?

The Witness: At the top of your mast.

By Mr. Toner:

Q. How far apart are these lights?

A. Five to 10 feet; it depends on the boat?

Q. How far apart were they on the Bessemer?

A. About 10 feet.

Q. And the white light is on top?

A. Not 10 feet; 5 probably.

Q. I am not trying to confuse you. I want to know what it is.

A. I don't want to get confused either.

Q. Say about 5? A. About 5; yes.

Q. The white light is on top?

A. No, the red light is on top on our ship.

Q. On the Bessemer the red light was on top?

A. That is right.

Q. And that is the red light you use when you are going to lower the net? A. Yes, that is right.

Q. Now another custom of fishermen that I would like to ask you about is this: What direction do you customarily run the circles around the school of fish? [53]

A. Well, you usually run counter-clockwise.

(Testimony of Anthony Di Leva)

Q. That is the custom, to run a counter-clockwise circle?

A. That is when you see the fish steady. When you see the fish steady you usually run counter-clockwise, but in the instance where we were, when the moon was up and you couldn't barely see them, you hear the fish flipping, breaking water, you listen to where you hear the biggest body of fish jumping, and that is where you turn.

Q. And it is usual, is it not, to run a clockwise circle?

A. Sometimes it is; not all the time.

Q. But usually you run counter-clockwise circles?

A. Yes.

Q. And exceptionally you run a counter-clockwise circle? A. That is right.

Q. How big a circle did you usually make around the fish?

A. Not very big. It depends on the school of fish.

Q. How big a circle were you making that night?

A. I would say about—you mean the width of it?

Q. Yes, the diameter of the circle.

A. Oh, about a hundred yards, I guess.

Q. Where were you on the boat? [54]

A. I was on the mast.

Q. Is that the white object on top of the mast in the model? A. Yes, the lookout.

Q. That is what you call the mast-man?

A. Yes.

Q. You were what was called the mast-man?

A. Yes.

Q. What is the mast-man's job?

A. To look for fish.

(Testimony of Anthony Di Leva)

Q. I suppose when the fish are in the vicinity you are very anxious to get the fish, aren't you?

A. That is true.

Q. And you keep your eye pretty well peeled for the fish?

A. That is true.

Q. Were you looking at the fish all the time you were making these circles?

A. No, I wasn't. I seen the Gloria R all the time.

Q. You were looking at the Gloria R all the time?

A. No, I didn't say that. I said I was looking at the fish and I seen the Gloria R all the time.

Q. And you also saw the fish all the time?

A. Also seen the fish because you could barely see them, you could hear them. You could hear them flipping. [55]

Q. Do you have a whistle aboard the vessel?

A. Yes, we have.

Q. Did you blow the whistle at any time before the collision?

A. There was no chance to blow the whistle, it happened so fast.

Q. Where was the Gloria R when you saw him just before the collision, when you last saw him just before the collision?

A. He was in front of our bow then. That is when I hollered "full speed reverse," and it was all they could do to reverse the engine full speed to try to clear ourselves.

Q. How far away was the Gloria R from the bow of the Bessemer when you yelled "full speed reverse"?

A. We were just ready to hit.

Q. In feet. A. I would say 40, 50 feet.

(Testimony of Anthony Di Leva)

Q. Forty or 50 feet? A. That is all.

Q. And she was then directly ahead of your vessel?

A. No, not directly yet, she was just crossing our bow then.

Q. Where was her bow with reference to your bow?

A. Say her bow was just coming right like this (indicating), right here, cutting across our bow. I yelled [56] to him "reverse full speed" and naturally the boat that has the forward motion, you can't stop, you can't put no brakes on. By the time you reverse it—there is a man on the controls, and by the time he reversed it full speed reverse you still got that forward motion for about a minute or so.

Q. Do you know what the center line of your fishing boat is, the fore and aft center line?

A. What do you mean?

Q. Running from the stem back to the center of the stern, that would be the center line of your vessel?

A. That is right.

Q. If you extend the center line of the Bessemer out 50 feet forward at this particular time when you yelled "full speed reverse," was the bow of the Gloria R over that line or was it at that line or was it near that line?

A. It was near that line then.

Q. How close to the line would it be?

A. His bow you mean?

Q. His bow. A. Just about right like I said.

The Court: You mean a foot or two from the line?

The Witness: Yes, that is right.

The Court: Or a foot or two from your actual bow?

The Witness: That is right.

The Court: Which, now? [57]

(Testimony of Anthony Di Leva)

The Witness: A foot or two from our bow.

The Court: From your actual bow?

The Witness: Bow; yes.

By Mr. Toner:

Q. That is when you said "full speed reverse," or whatever you said? A. Yes.

Q. What exact words did you use?

A. I said in Italian what meant "full speed astern."

Q. How long does it take the Bessemer to go from slow ahead to full astern?

A. I never timed it but it takes a minute or two.

Q. Is it a direct reversible engine?

A. No, it isn't; it is a clutch.

Q. You have to take it out of slow ahead and—

A. Yes, that is right.

Q. Just describe the operation.

A. That is all it is. It is a little wheel here, you just throw the clutch in, I guess turn it half in, or ahead, I mean, to take it out and then turn a half to stern.

Mr. Toner: Let the record show that the witness is describing a wheel of about a foot in diameter.

The Witness: Yes.

Mr. Toner: And making circles, sometimes one way and sometimes in the opposite direction. [58]

The Witness: That is for ahead and to take it ahead, and this is to go in reverse.

By Mr. Toner:

Q. Where is this wheel, this control wheel?

A. It is right next to the wheel, the steering wheel.

Q. Who runs that control?

A. I had my brother on there. There is a control man and a wheel man.

(Testimony of Anthony Di Leva)

Q. One man is at the control and the other man is at the wheel? A. Yes, sir.

Q. How many turns does it take to go from slow ahead to take the motor out of gear?

A. About a turn and a half.

Q. A turn and a half? A. Yes.

Q. Then what do you do?

A. Then you take a turn and a half to go reverse. Then you have to speed the engine up.

Q. Do you have a separate throttle for speeding the engine up?

A. Yes, we have. That is right above the clutch to go ahead and reverse.

Q. Your control went through those motions?

A. Yes, he did. [59]

Q. And actually the vessel was going full astern at the time of the collision?

A. It was going full astern—it wasn't going full astern, we had the engine full astern but the boat still had the forward motion. The vessel had the forward motion.

Q. The vessel was actually continuing forward because the propeller had not yet caught to bring her astern? A. That is right.

Q. How fast were you going before you put the engine full astern?

A. About a mile, mile and a half.

Q. How fast were you going when the bow of the Bessemer collided with the Gloria R?

A. Say that again, please.

Q. How fast was the Bessemer going when the bow of the Bessemer collided with the Gloria R?

A. As I say, we had the engine full speed reverse.

(Testimony of Anthony Di Leva)

Q. How fast were you going forward?

A. I won't say, about half a mile not even, quarter of a mile, something like that.

Q. A half mile or what?

A. About a quarter of a mile say.

Q. A half mile or a quarter of a mile?

A. A quarter, I would say.

Q. Is that correct? [60] A. A quarter.

Q. Where was your father on the vessel?

A. He was on the wheel, this wheel here to steer the boat.

Q. Is he in court today?

A. No, he is up in the mountains.

Q. When did he leave to go to the mountains?

A. He left Monday. He didn't know nothing about this. In fact, the trial was postponed until next month, the 20th, something like that next month, and he just left.

Q. He didn't testify at the last trial either, did he?

A. No, he didn't.

The Court: The trial was not postponed.

The Witness: I mean it was supposed to, and then it came back on the calendar again. That is the way I understand it.

Mr. Toner: If I may insert the remark—

The Court: I think we will have a short recess.

. (Short recess.)

By Mr. Toner:

Q. Tony, you didn't have time to blow the whistle before the collision? A. No, I didn't have time.

The Court: Where is the blower for the whistle?

The Witness: Right above the helmsman here. [61]

(Testimony of Anthony Di Leva)

The Court: And the helmsman blows the whistle?

The Witness: Yes.

The Court: How far away was the Gloria R when you first saw it heading towards your boat?

The Witness: Well, as I say, your Honor, we were listening for the fish when I first seen him. It was his red light. I thought he was going to come past our stern. Then after I seen the red and green—

The Court: How far away was he when you first saw the red and green?

The Witness: I would say about 150 yards away.

The Court: Then what happened?

The Witness: Then I talked to my father, I heard them flipping on this side again, the right side, he was ready to lower the net, then all of a sudden I seen the green light instead of the red and green.

The Court: How far away was he then, about?

The Witness: He was just ready to cross our boat?

The Court: Ten or 15 feet?

The Witness: About 25 or 30, I guess.

The Court: And he was going about seven knots all the time?

The Witness: About eight knots, I would say.

The Court: All right. [62]

By Mr. Toner:

Q. Did you testify that Mr. Gillis of Van Camp Sea Food Company put you on as master?

A. Yes, she did.

Q. When was that?

A. Mr. Gillis and Mr. Lindy too.

(Testimony of Anthony Di Leva)

Q. Mr. Lindy and Gillis? A. Yes.

Q. Who are they? What position do they occupy?

A. I think Mr. Gillis is the vice president. Mr. Lindy is the general manager.

Q. When you went out with the Bessemer in the earlier part of the evening, where did you fuel?

A. Van Camp Sea Food. We had the fuel already on the boat.

Q. Where did you get the fuel on the boat?

A. From Van Camp Sea Food Company.

Q. From their oil dock?

A. Yes. They have their own oil dock.

Q. They provided the fuel for the vessel?

A. No, we got the fuel at the Van Camp oil station, but they don't provide the fuel.

Q. To whom was it charged?

A. It was charged to us, the crew.

Q. Wasn't it charged to the vessel? [63]

A. To the vessel, yes, but we paid for the fuel.

Q. How was it paid, by check?

A. Yes, it was paid by check.

Q. Who paid the check?

A. Van Camp out of our fish account.

The Court: They deducted it from your lay?

The Witness: Yes, that is expenses.

By Mr. Toner:

Q. That is part of the gross expenses that is deducted before your share comes out? A. That is right.

Q. But Van Camp Sea Food actually made out the check for the fuel?

A. They make out the check. He makes the figures out for us.

(Testimony of Anthony Di Leva)

Q. Who do you mean by "he"?

A. We have, say, 10,000 pounds of fish, and they have their own public accountant there, and he splits the money for us.

The Court: In other words, he takes the value of the lay, then gives you an account, so much for fuel deducted and so much for this and that?

The Witness: Yes, so much for the boat's share. He takes the boat's share and then he gives us the net share and he gives us a half share for running the boat. [64]

By Mr. Toner:

Q. But you actually never pay any money or make out any checks for fuel or groceries or oil or any of the running expenses of the ship?

A. What do you mean, make out the checks?

Q. You don't actually pay the man who put the oil on board? A. Yes, we do. We do pay the man.

Q. It is charged back to you but you don't actually have anything to do with them, do you?

A. Yes, we are the ones that are making the pay. If we don't pay that bill he don't pay it.

The Court: What you mean is that you do not physically hand the money to him?

The Witness: He sends the bills right to the cannery and when we make a pay day he says there are so many bills, so much for the oil, and so much comes out of our pay.

By Mr. Toner:

Q. And the cannery tells you that they have paid the fuel bill and it is so much and they charge it back to you?

A. We are paying the cannery because the cannery paid the bill.

(Testimony of Anthony Di Leva)

Q. That is right, the cannery pays the bill and you pay the cannery back. A. Yes, that amount. [65]

Q. Who pays the maintenance of the boat, the boat painting and the upkeep and engine repairs?

A. Van Camp pays that because that is their boat.

Q. You don't pay that?

A. No, not maintenance of the boat. We pay the maintenance of the net, not of the boat.

Q. That is correct. Then who pays the withholding tax? A. Everybody does.

Q. Is that taken out by Van Camp?

A. Yes. As I say, the public accountant is there, he takes the withholding tax out.

Q. Are there any other deductions that are made from your net shares? A. No.

The Court: You mean the share of the net or from the net shares that go to the individual?

Mr. Toner: I am sorry.

Q. From the shares that you get finally after all expenses are paid, what other expenses are taken out?

A. There is groceries, that is all.

Q. How about the union dues?

A. No, you pay the union dues yourself.

Q. The individual fishermen pay the union dues?

A. Yes. [66]

Q. Isn't there some boat owners' association?

A. There is. They get half of 1 per cent.

Q. That is paid by Van Camp?

A. That is paid by Van Camp out of our check.

Q. That is deducted from the gross expenses?

A. Yes, from our check, from each individual check.

Q. It is a deduction? A. It is a deduction; yes.

(Testimony of Anthony Di Leva)

Q. Now, Tony, you said that before the collision the two boats were red to red? A. Yes, they were.

Q. Is that correct? A. Yes.

Q. That means that you could see the Gloria R's red light and the Gloria R could see your red light?

A. That is true.

Q. Will you come down to the diagram here and draw in over in this position the Bessemer about that big, indicating a couple of inches, and showing the Bessemer in the direction that the Bessemer was when you saw the Gloria R's red light and when they could see your red light.

A. (Drawing on blackboard) After making a circle?

Q. When you said that they were red to red.

Mr. Lande: At what position?

Mr. Toner: At any time when they were red to red, when [67] the two boats were red to red.

The Court: He said they were red to red there when he was in position 3 or 4 and they were in position C.

The Witness: They were at C.

By Mr. Toner:

Q. I want you to put in the relative direction of the two vessels. Would you draw in a big vessel there, when you are at position 3?

A. This should be a little longer. (Drawing on blackboard)

Q. Now put in an "R" for the red light and a "G" for the green light. A. (Drawing on blackboard)

The Court: Whose boat is that?

Mr. Toner: That is the Bessemer in blue.

The Witness: The Bessemer.

(Testimony of Anthony Di Leva)

By Mr. Toner:

Q. Now put in the direction of the Gloria R when the two vessels were red to red.

A. (Drawing on blackboard)

Q. Now put in an "R" and a "G" there.

A. (Drawing on blackboard)

Q. And put in "G" for the Gloria R.

A. (Drawing on blackboard)

Q. Neither of these running lights are screened, are [68] they? A. Yes, sir, they are.

Q. Will you describe the screens?

A. What do you mean, describe them?

Q. What do the screen boards look like. What do they do? A. Here they are, right here (Indicating)

Q. That can't be seen in the record.

A. That is exactly the same thing here. There is the boards, and then they have the light inside of the screen so it won't spread too far, the light.

Q. How far to either side of dead ahead can the running lights be seen? A. How far?

Q. Yes.

A. Oh, my God, you can see them for two or three miles.

The Court: Do you mean in degrees of a circle?

By Mr. Toner:

Q. Can you see the green light to the right-hand side of a vessel—to the left-hand side of a vessel, I mean? In other words, you have the inboard screen. What does that do?

A. You mean this? If he is giving red and red you can't see his green. [69]

(Testimony of Anthony Di Leva)

Q. Because of the screen?

A. The only time you can see his green is, say he turns a little to port, you can see his red and green. If he turns it hard over then it just shows green.

Q. You can't see the green because of this inboard screen, is that right?

A. No, it is not; you can't see because it is on the opposite side of the vessel.

Q. A running light is visible from dead ahead?

A. Dead ahead.

Q. And to one side? A. To one side; yes.

Q. That is the only point I wanted to bring out. I believe that is all.

The Court: Redirect?

Mr. Lande: Yes, your Honor.

Redirect Examination

By Mr. Lande:

Q. Mr. Di Leva, what is the custom of San Pedro fishermen in regard to putting on the red light while fishing?

A. Well, the custom is that the red light is put on—

The Court: That is the mast light?

The Witness: Yes—when you are lowering the net. But a lot of them put it on, which sometimes they practice to scare the other boats, approaching boats, away because they [70] know that the red light means that the net is in the water, and naturally when they are off fish they put the red light on sometimes to scare them away from the vessel.

By Mr. Lande:

Q. That isn't a fair operation? A. No, it isn't.

(Testimony of Anthony Di Leva)

Q. Tell the Court what the true custom is in putting the red mast light on.

A. Putting the red mast light on is to signify you are lowering your net, or your nets are lowered.

Q. Had you lowered your net at any time before the collision?

A. No, we didn't. We were just ready to.

The Court: Was your red mast light on?

The Witness: No, it wasn't.

The Court: Was your white running light on?

The Witness: No, it wasn't. When you are running for fish your white light isn't on, just your red and green light, because it throws light and you can't see the fish.

Mr. Lande: That is all.

Recross-Examination

By Mr. Toner:

Q. Tony, when you spoke of the white light you mean the raised light on the mast? A. Raised light. [71]

Mr. Toner: That is all.

Redirect Examination

By Mr. Lande:

Q. Whose net was on that boat?

A. Our net.

Q. How many shares did you receive for the use of your net? A. Two and a half shares.

Q. And how many crewmen did you have on board?

A. Thirteen.

Q. How many shares did each crewman get?

A. One share.

Q. How many shares did you get as master?

A. We got one and a half.

(Testimony of Anthony Di Leva)

Q. Whose half was that taken out of, the crew?

A. Of the boat's share.

Q. How many shares did the boat then have?

A. The boat had three and a quarter.

Q. Three and a quarter, and a half to you as master?

A. Yes, so he got two and three-quarters and we got three.

The Court: Who?

The Witness: The boat. After he deducted the half a share.

The Court: You got one for the master? [72]

The Witness: No, my working share and half a share for running the boat.

The Court: There were 13 other men besides you?

The Witness: That is right.

The Court: So there were 14 crew members?

The Witness: No, 13 altogether.

The Court: So there were 12 besides you?

The Witness: Yes.

The Court: There were 19 shares then?

The Witness: Nineteen and three-quarters.

Mr. Toner: I think there are eighteen and three-quarters.

The Witness: I mean eighteen and three-quarters. You are right.

Mr. Lande: Nothing further, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Lande: Salvatore Carnevale.

SALVATORE CARNEVALE,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Salvatore Carnevale.

The Clerk: Will you spell that name?

The Witness: C-a-r-n-e-v-a-l-e. [73]

The Clerk: Your address?

The Witness: 465 16th Street, San Pedro.

Direct Examination

By Mr. Lande:

Q. Mr. Carnevale, whereabouts were you on the Bessemer the night of the collision?

A. I was alongside the captain, the one who got the wheel.

Q. You were alongside the man at the wheel?

A. Yes.

Q. Did you see the Gloria R before the collision?

A. Yes.

Q. What light did you see on the Gloria R at that time? A. Red light.

Q. What light on your boat was facing the Gloria R?

A. Red light too.

Q. You were red to red? A. Yes.

Q. Tell the Court what happened after that.

A. Well—

The Court: Tell us how far away the Gloria R was when you saw the red light.

The Witness: It was about 150 yards, maybe 200 yards, something like that. I can't measure that, but I can imagine [74] about 150 yards to 200 yards.

(Testimony of Salvatore Carnevale)

The Court: Then what happened?

The Witness: They were circling on top of the fish and we passed right on top of the middle of the fish, we make another circle again and we pass that middle of the fish again, we make another turn on the right just ready to set the nets and all at once the Gloria R come right straight before the stern. Only once he turns the wheel and he passed by full speed all the time and never slowed down. And Tony, he started to holler, "Back up, back up." We started to back up all at once and they go right past us with the same speed all the time. When about half-way he turned the wheel and he pushed all this (indicating) to this side and he hit us, and he make a turn again and asked us how you are, bad leak or something on the boat. We say we can make it to San Pedro. Then we started to go to San Pedro.

By Mr. Lande:

Q. Did you see the green light of the Gloria R as she swung in front of you?

A. Yes.

Q. About how fast was she going when she swung in front of you?

A. She was in full speed all the time, never slowed down until she hit us. After she hit us she slowed down.

Q. What is full speed of a vessel like the Gloria R? [75]

A. I imagine about seven, seven and a half, eight. They don't make no more than that, that kind of a boat.

Mr. Lande: That is all, your Honor.

The Court: Cross-examine.

(Testimony of Salvatore Carnevale)

Cross-Examination

By Mr. Toner:

Q. You were in the pilot house?

A. On top the pilot house.

Q. On top the pilot house? A. Yes.

Q. Who was there with you?

A. Tony's father and his brother Mike.

Q. What is Tony's brother's name?

A. Mike.

Q. Who was at the wheel? A. His father.

Q. That is Salvatore? A. Yes.

Q. Who was at the control? A. His brother.

Q. How long does it take to go from slow ahead to full astern? A. One second.

Q. One second?

A. Just a turn like this (indicating); just turn the [76] wheel like that, that is all, one to two seconds.

Q. What do you have to do?

A. That is all. Just take the wheel, turn it around like this, back up, and then you give it the power. (Indicating.) You have the power right close to you. You push it like that and get more power to back up. (Illustrating.)

Q. How many turns do you have to give the wheel?

A. A turn and a half.

Q. And to take it out of gear?

A. A turn and a half, and a turn and a half to put them in gear again in back.

Q. What were you doing on the pilot house?

A. Every night I stand still alongside of him all night long every day, ever since I have been fishing with him.

(Testimony of Salvatore Carnevale)

Q. Were you a lookout?

A. I looked for the fish too.

Q. You were looking for the fish?

A. Yes, I look for the fish. I was on top to give a little help.

Q. Where was the school of fish when you saw the Gloria R make this turn?

A. Pretty close in front of Avalon.

Q. Where with reference to your boat was the school of fish? How far away from your boat was the school of fish? [77]

A. It was alongside the boat. We make a circle all the time alongside.

Q. Which side of your boat was the school of fish on?

A. On this side.

Q. On the port side? A. Yes.

Q. How big was the school?

A. Maybe a hundred ton, maybe 50, maybe 75—nobody knows. If you don't catch them, you don't know. It was a big school.

Q. It was a hundred yards across? A. Yes.

Q. A big school? A. Yes.

Q. How much? A. A big school of fish.

Q. Did it extend back to the stern of the boat?

A. About 50, 75 yards.

Q. Did the school extend to the port stern?

The Court: He said 75 yards.

By Mr. Toner:

Q. Did you say you heard Tony holler "wake up"?

A. What?

(Testimony of Salvatore Carnevale)

Q. Did you say you heard Tony holler "wake up"?

A. He said, "Back up, back up." [78]

Q. And he was hollering to you down in the pilot house?

A. Yes.

Q. The Gloria R only made one turn?

A. No, they made two or three turns.

Q. The Gloria R?

A. They made two this way all the time. (Illustrating)

Q. You mean the Bessemer made two turns?

A. Yes. The Gloria R was so far away, a little far at first, then come in closer to us all the time. He wants to take our fish.

Q. They wanted to take your fish away?

A. If he didn't want to take our fish he would pass far away because there are only two boats on a hundred miles of ocean. I never seen any boats all night, just the two boats.

Q. You didn't have your red light on?

A. We have red and green.

Q. The red on the mast?

A. No, because we never set the nets. We never got the nets in the ocean.

Q. Did you have the skiff in the water?

A. We have the skiff in the water and two men in the skiff. [79]

Q. Did you have any part of a net in the skiff?

A. No, just the end of the nets.

Q. The rope at the end of the nets? A. Yes.

(Testimony of Salvatore Carnevale)

Q. If you wanted to keep the Gloria R away you would put on your red light, wouldn't you, on the mast?

A. No, it is worse, because when you put the red light on he wants more than ever to come and steal your fish.

The Court: You put the red light on and they come and steal your fish?

The Witness: Yes, another boat come in and want to steal our fish, and you get an argument a lot of times.

The Court: So you do not put your red light on until the nets are down?

The Witness: Until the nets are down.

By Mr. Toner:

Q. You didn't have the white light on the mast?

A. No, because you can't see the fish. It shines too much white.

Q. You leave the white light off because you can't see the fish then?

A. No, just put the green and red.

Q. How long have you been on the Bessemer?

A. Maybe a couple of months, three months, something like that. [80]

Q. Have you been with the same crew ever since?

A. Oh, yes; same crew.

Q. What boat are you on now? A. Victoria.

Mr. Toner: That is all.

The Court: Step down.

(Witness excused.)

Mr. Lande: Jack Olsen.

JACK OLSEN

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Jack Olsen.

The Clerk: S-e-n?

The Witness: Yes.

The Clerk: Your address?

The Witness: 1147 22nd Street.

The Clerk: San Pedro?

The Witness: San Pedro; yes.

Direct Examination

By Mr. Lande:

Q. Mr. Olsen, what is your occupation?

A. Engineer and fisherman.

Q. How long have you been an engineer?

A. Oh, for 18, 20 years, off and on. [81]

Q. How long have you been a fisherman?

A. Well, I would say for about 38 years.

Q. Were you on the Bessemer the night of the collision?

A. I was.

Q. Whereabouts on the Bessemer were you?

A. I was standing in the midships on the port side.

Q. Will you step over to the model and indicate to the Court just where you were?

A. Right here. (Indicating)

The Court: Amidship, port side?

The Witness: Yes, that is correct.

By Mr. Lande:

Q. Did you see the Gloria R before the collision?

A. Yes, I did.

(Testimony of Jack Olsen)

Q. What lights did you see on the Gloria R?

A. Red.

Q. How far away was the Gloria R about that time?

A. I should say about 300 yards.

Q. What did you do next? What happened next?

A. I turned around and talked to the man standing by to let go the skiff. I said, "I think we will get a load out of this," and when I turned around then I saw the Gloria R's green light.

Q. About how long do you think it was between the time [82] you saw her red light and the time you saw her—you turned around and talked and then saw her green light again?

A. Oh, maybe a minute.

Q. Then what happened after that?

A. Well, I saw the two boats were going to come together, so I said, "You better brace yourself, you are going to get hit and hit hard."

Q. What happened?

A. Then I heard the engine went in reverse.

Q. Then what? A. Then we hit.

Q. Did you see the actual collision from where you were standing?

A. No, I couldn't because the house obstructed some part of it. I saw the stern of the vessel, yes.

Q. Did you observe the damage done to your boat after the collision? A. Yes, I did.

Q. Tell the Court what damage was done to your boat.

A. The stem was split from top all the way down below the water line. When we hit it split it wide open,

(Testimony of Jack Olsen)

and the stem bent the iron part of the stem here. It was bent out this way. (Indicating)

Q. In other words, the iron point of the stem was bent to the right or starboard side? [83]

A. Yes, to the right; yes.

Mr. Lande: Cross-examine.

Just one more question.

Q. Did you form any estimate of the speed of the Gloria R during the time you saw her?

A. She practically went all the time at full speed.

Q. What does that mean?

A. A boat like that, with that power makes about between seven to eight knots.

Q. Did she slow down any time before the collision?

A. Not that I noticed.

Mr. Lande: That is all.

Cross-Examination

By Mr. Toner:

Q. Mr. Olsen, how far off was the Gloria R when you say her green light?

A. Well, it was pretty close.

Q. In feet?

A. I couldn't say. I wouldn't say in feet. It is impossible to judge.

Q. Was it five feet—

The Court: Was it as far away as the back wall of the room?

The Witness: No, it wasn't that far, I don't think. [84]

By Mr. Toner:

Q. It wasn't that far?

A. It was pretty close.

(Testimony of Jack Olsen)

Q. Was it half as far as the back wall?

A. Yes.

Q. It was about half as far as to the back wall?

A. Probably a little more than that.

Mr. Toner: Does the Court have any judicial notice to take as to how long the courtroom is here?

The Court: I have forgotten. I should say the courtroom is probably—

The Clerk: It is about 80 feet, I think.

The Court: No. From the witness stand back there to the first row of seats I would say is about 35 or 30 feet.

By Mr. Toner:

Q. Between 30 and 35 feet? A. Yes.

Q. That is where the Gloria R was when you saw the green light? A. That is right.

Q. And you had not seen the Gloria R before that between the time she was 300 yards away and the time she was 35 feet away, is that it? A. No.

Q. You didn't hear her at all then? You saw the red [85] light when she was 300 yards away?

A. Yes, just about. I couldn't say the distance exactly, you know.

Q. About 300 yards?

A. Yes. Sometimes the weather and the atmosphere makes it pretty hard to judge distance.

Q. How was the weather that night?

A. It was clear.

Q. Clear and calm? A. Yes.

Q. Was the moon out?

A. Yes, the moon was up, just about at the rim of the horizon.

(Testimony of Jack Olsen)

Q. Then you didn't see the Gloria R at all from the time she was 300 yards away until she was 35 feet away?

A. Just about.

Q. And during that time you were talking to somebody else? A. Yes.

Q. Who were you talking to?

A. I forgot who it was. I don't remember his name. It was the skiff man.

The Court: He was the skiff man?

The Witness: No, he was at the lines ready to let go of the skiff. [86]

The Court: He was holding the line on the skiff?

The Witness: Yes.

By Mr. Toner:

Q. What was the Gloria R doing when you saw her when she was 30 to 35 feet away?

A. She was coming right on our port side quite a ways off.

Q. She was going full ahead?

A. Yes, as far as I could see.

Q. Was she going straight across your bow?

A. That is what I noticed when I saw her red lights—what did you say?

Q. She was going straight across your bow when you saw her 35 feet away?

A. That was the green light.

Q. You saw her green light at that time?

A. Yes.

Q. And at that time she was going straight across your bow, her direction was headed across your bow?

A. She is bound to do that when you see the green light on the port side of your vessel.

(Testimony of Jack Olsen)

Q. I don't care whether she was bound to or not; was she actually doing that?

A. That is what she was doing.

Q. That is what she was doing? [87]

A. Yes, going across our bow.

Q. At that time the engine was in reverse, was it, your engine?

A. It was just about the time that they put the engine in reverse.

Q. It was just about the time what?

A. That they put the engine in reverse.

Q. Your boat continued forward?

A. Well, very slowly.

Q. How fast were you going before your engine was put in reverse?

A. She was going with the clutch in, I imagine, about a mile and a half, two miles.

Q. How long does it take to stop that forward motion of a boat when she is going one-half miles an hour and you give her full astern?

A. Give me the dimensions of the vessel.

Q. I didn't understand.

A. It depends on the dimensions of the vessel and the heft of the vessel.

Q. How long would it take the Bessemer to execute that maneuver?

A. Two knots, I think she will travel about, say, 45 yards.

Q. Forty-five yards in how long? [88]

A. Before she comes to a dead stop.

Q. How long a time would that take?

The Court: He said if going two knots an hour.

(Testimony of Jack Olsen)

Mr. Toner: He said it would go 45 yards.

The Court: Yes, if he was traveling at the rate of two knots an hour and he executed the maneuver she would travel 45 yards before she would come to a full stop. Then how long before you got her going back?

Mr. Toner: I think the full stop satisfies the particular situation here.

The Court: All right.

By Mr. Toner:

Q. How long a time would that take before she came to a full stop at two knots?

A. It may be three minutes, two to three minutes.

Q. Would you say that two knots was the speed of the Bessemer just before the collision?

A. No, I wouldn't say exactly because I would have to judge that.

Q. Would you say it was one and a half knots?

A. I would say around one and a half.

Q. How long a distance would the Bessemer coast forward at one and a half knots?

A. Before she comes to a dead stop?

Q. Before she comes to a dead stop with her engines [89] running full astern.

A. Approximately 100 feet or so.

Q. One hundred feet?

A. Yes; probably a little more.

Q. Or a little more? A. Yes.

Q. How long does it take to get the Bessemer—strike that.

How long would it take the Bessemer that night to go from slow ahead to full astern?

A. What do you mean, the motion of the boat?

(Testimony of Jack Olsen)

Q. In time, from the time that the man at the controls released the clutch and turned the wheel until the time the engine went full astern?

A. That would take approximately half a minute.

Q. Did you hear any whistle blown on the Bessemer?

A. No.

Q. No whistle? A. No.

Q. How big a school of fish was this in feet, or area?

A. I couldn't say because I just come up from the engine room and I didn't see the whole school.

Q. But you thought it was a pretty good school?

A. I did by listening to the sound of the flips.

Q. But you couldn't see the school? [90]

A. No.

Q. And you didn't see the school?

A. No, but I heard it.

Q. You heard the school? A. Yes.

Q. Can you tell me which is the customary direction that a fishing boat circles a school, do they circle clockwise or counter-clockwise?

A. It just depends on which way the school moves.

Q. What is the custom?

A. There is no custom to it.

Q. No custom at all?

A. It is in either direction that the school of fish travels.

Q. You heard Tony Di Leva here say that the fishermen usually circle counter-clockwise.

A. When they are setting the net, yes, you go to the left.

(Testimony of Jack Olsen)

Q. They go to the left?

A. Yes, and set the net.

Q. They usually go to the left? A. Yes.

Mr. Lande: When they are setting the net.

By Mr. Toner:

Q. When they are setting the net? [91]

A. Yes.

Q. But it didn't make any difference either way when they are circling the school? A. No.

Q. Do they also go to the left when they set the net?

A. As a general rule they do. Sometimes they set to the right but it is very seldom.

Q. Why do they set to the left?

A. All the working gear is on the left side of the ship.

Q. And it is more convenient for a purse seiner to circle to the left? A. Yes.

Q. And that is the reason they circle to the left?

A. Yes.

Q. When a fishing boat is on fish, what is the duty of the mastman?

A. Well, he sets the gear, he lets you know when to let go the skiff and he watches the fish, follows the fish and directs the wheelman which way to turn.

Q. In order to stay on the school of fish?

A. Yes.

Q. And in order to get in a position where he can set the net and catch the fish? A. That is right. [92]

Q. What is the duty of the wheelsman?

A. The wheelsman, he has got to do what the mastman tells him to do.

(Testimony of Jack Olsen)

Q. What is the duty of the lookout on top of the pilot house?

A. The lookout—you always have one or two or three men to look for the fish. They all help to look for the fish whenever you are on a fishing boat.

Q. Was there anybody on the Bessemer whose job it was to look out for other vessels?

A. Well, I couldn't answer that.

Q. Do you know or don't you?

A. No, I don't know.

Q. Everybody that was on the pilot house, he had the job to look for fish?

A. I wasn't up there. I couldn't tell you who was up there.

Mr. Lande: I object to this line of questioning on the ground that this man is the engineer, not the captain or navigator of the vessel.

The Court: He is just asking who was there. If he doesn't know, he can say so.

The Witness: I said I don't.

The Court: He said he doesn't know.

Mr. Toner: That is all. [93]

The Court: Is that all?

Mr. Lande: Nothing further.

(Witness excused.)

The Court: We will recess until 2:00 o'clock. Are you resting now?

Mr. Lande: With the exception of the introduction of some documentary evidence that we have.

The Court: Recess until 2:00 o'clock.

(Whereupon, at 12:10 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same date.) [94]

Los Angeles, California; October 30, 1947;

2:00 o'clock P. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

Mr. Lande: I would like to introduce this as Libelant's exhibit next in order.

The Court: No. 2. Admitted.

(The document referred to was received in evidence and marked Libelant's Exhibit No. 2.)

The Court: Are you offering No. 1 in evidence?

Mr. Toner: There is no objection.

Mr. Lande: I am not offering No. 1 in evidence, your Honor.

I would like to offer next in evidence a letter from the California State Fisheries Laboratory, giving the deliveries of fish, sardines, between October 4 and 13, 1944; total amount of deliveries and the number of boats; also what our boat caught during that month.

Then attached to that are the daily deliveries of the Bessemer during October, November and December.

Mr. Toner will stipulate, I believe, that if an official of the State Fish and Game were called he would so testify.

The Court: In other words, he will waive foundation?

Mr. Toner: Yes. I will stipulate that these are taken from official records and that if called the representative [95] of the State Fish and Game Commission would so testify.

However, I would like to object to the entry of these exhibits on the ground that the exhibits are matters not

properly before the Court at this time inasmuch as this hearing should be on the issue of liability only.

The Court: Objection overruled. Admitted in evidence.

The Clerk: No. 3.

(The document referred to was received in evidence and marked Libelant's Exhibit No. 3.)

[LIBELANTS' EXHIBIT NO. 3]

[Crest]

State of California
Department of Natural Resources
Division of Fish and Game

CALIFORNIA STATE FISHERIES LABORATORY
Terminal Island, California

May 14, 1946

To Whom It May Concern:

The official records of the California Division of Fish and Game show that 66,389,680 pounds of sardines were delivered in the Los Angeles area between October 4-13, 1944, both dates inclusive.

The total deliveries in the Los Angeles area by months were:

| <u>Total Deliveries</u> | <u>Pounds</u> | <u>No. of Boats</u> |
|-------------------------|---------------|---------------------|
| October 1944 | 149,347,983 | 89 |
| November 1944 | 56,127,307 | 89 |
| December 1944 | 85,481,112 | 92 |

(Libelants' Exhibit No. 3)

The seine boat Bessemer Fish and Game No. 2097 delivered poundages as follows:

| | | |
|----------|------|-----------|
| October | 1944 | 896,850 |
| November | 1944 | 1,047,450 |
| December | 1944 | 895,569 |

Very truly yours,

Frances N. Clark
 Frances N. Clark, Chief
 Bureau of Marine Fisheries

FNC:ras

DAILY DELIVERIES OF BESSEMER 1944

| <u>October</u> | | <u>November</u> | |
|----------------|---------|-----------------|---------|
| 14..... | 60,250 | 8..... | 128,500 |
| 16..... | 156,500 | 9..... | 130,000 |
| 17..... | 32,500 | 10..... | 84,200 |
| 18..... | 16,800 | 11..... | 1,000 |
| 19..... | 80,000 | | 110,000 |
| 21..... | 186,300 | 15..... | 28,500 |
| 23..... | 41,200 | | 20,000 |
| 24..... | 96,300 | 16..... | 80,000 |
| 25..... | 30,000 | 17..... | 81,250 |
| 27..... | 87,000 | 20..... | 59,000 |
| 28..... | 110,000 | 21..... | 68,000 |
| | | 24..... | 88,500 |
| | 896,850 | 25..... | 168,500 |

1,047,450

~~10,474,450~~

(Libelants' Exhibit No. 3)

| | | <u>December</u> | |
|---------|-------------------|-----------------|-------------------|
| 5..... | 191,500 | 14..... | 54,500 |
| 6..... | 20,500 | 15..... | 27,700 |
| 7..... | 82,500 | | [Written] 662,425 |
| 8..... | 148,500 | 18..... | 85,500 |
| 9..... | 6,875 | 19..... | 144 |
| | 68,250 | | 14,500 |
| | 13,500 | 20..... | 23,000 |
| 12..... | 38,600 | 21..... | 95,000 |
| 13..... | 10,000 | 22..... | 15,000 |
| | [Written] 580,225 | | |
| | | | 895,569 |

No. 4630-BH adm. Libs.' Exhibit No. 1. Filed May 16, 1946. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Case No. 4630-PH. Di Leva vs. Van Camp. Lib. Exhibit No. 3. Date Oct. 30, 1947. No. 3 Identification. Date Oct. 30, 1947. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

The Court: Let me see, in the respondents' answer to the fifth amended complaint, was there an admission that the parties named were employees or were in the service of the vessel?

Mr. Toner: Yes.

The Court: They were admitted to be employees of Van Camp Sea Food?

Mr. Toner: Yes. They are admitted to be employees of the Van Camp Sea Food Company.

The Court: And under your opening statement they are—what did you call them—“grossly” employees?

Mr. Lande: Grossly speaking, they are employees. I will go into that matter when we go into the argument. I would say commonly speaking, they are employees.

The Court: Commonly speaking they are employees?

Mr. Lande: Yes. [96]

The Court: Is there an allegation here that they were each to get one share of the lay?

Mr. Lande: Yes, your Honor.

The Court: Very well. Proceed.

Mr. Toner: There is the further statement in the answer that both vessels were operated under identical terms.

The Court: That is not up to him to prove.

Mr. Lande: We rest, your Honor.

The Court: The libelant rests.

Mr. Toner: If the Court please, I should like at this time to move to dismiss as to the respondent Gennaro Di Leva on the ground that no evidence has been introduced that in any way connects him with the case.

The Court: No, his name has not been mentioned by any of the witnesses.

Do you oppose the motion?

Mr. Lande: No, your Honor.

The Court: Motion granted.

Mr. Lande: May I say something on that score?

The Court: You have already said no.

Mr. Lande: Only this, that I make that statement upon the assumption that the respondent's position is not to be changed, to wit, that the crew of the Gloria R were

employees of Van Camp Sea Food. So under that situation it doesn't make any difference who the individual employees were. If [97] Van Camp wants to dismiss as to their employees, that is up to them. We are seeking to hold Van Camp Sea Food on the tort libel.

The Court: I have to consider the motion on the basis of the evidence before me and the admissions in the pleadings. There is no admission in the pleadings that Gennaro Di Leva was a separate charterer of the boat Gloria R, and there has been no testimony at all that has so much as mentioned his name. The motion is granted.

Mr. Toner: I will call Anthony Di Leva.

The Court: This is the other Anthony Di Leva?

Mr. Toner: This is the Anthony on the Gloria R.

ANTHONY DI LEVA,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Anthony Di Leva.

The Clerk: Your address?

The Witness: 660 Ninth Street, San Pedro.

The Court: You are not the same Anthony Di Leva who was sworn and testified this morning?

The Witness: No, sir. [98]

Direct Examination

By Mr. Toner:

Q. Tony, how long have you been going to sea fishing?

A. Oh, I graduated from school in '41 and I started going regular since '41 to sea fishing, but in between

(Testimony of Anthony Di Leva)

that since I was 15 I was going in the summer months off and on fishing all the time.

Q. Were you fishing with your father?

A. Yes, sir.

The Court: What is your father's name, the same as the other Di Leva's name?

The Witness: No, Gennaro Di Leva.

By Mr. Toner:

Q. Tony, on October 4, 1944 you were the skipper of the Gloria R?

A. That is right, master, signed on as master of the Gloria R, and skipper.

Q. And in the evening of October 4th your vessel was in a collision with the Bessemer, is that correct?

A. Yes.

Q. Now at the time and shortly before the collision where were you on the Gloria R?

A. At the time of the collision—before I was on the mast. I was the mastman.

Q. You were the mastman? [99]

A. Yes, looking for fish.

Q. The mastman stands in the crow's nest?

A. The crow's nest. I will point it out. Right here.
(Indicating)

Mr. Toner: Let the record show the witness is pointing to the model.

Q. And what is the duty of the mastman?

A. The mastman is to be always on the alert, looking for fish, and when you do come on fish you are to tell the wheelsman which way to go on the fish.

Q. What time did you start fishing on October 4th?

A. About 7:00 o'clock in the evening we start looking for fish.

(Testimony of Anthony Di Leva)

Q. What time was the collision?

A. It must have occurred about 9:30. That is what I can figure by now. It happened about three years ago.

Q. Approximately 9:30? A. Yes.

Q. And what did you do—where was the boat from 7:00 until 9:30?

A. We were proceeding from—well, we call it the bank there—we were outside of San Pedro. There is a bank there. We looked around there for a while and then we headed toward the east end of Catalina looking for fish.

Q. And you got to the east end of Catalina about when? [100]

A. Oh, I would say about 9:00 o'clock, something like that.

Q. Around 9:00 o'clock? A. Yes.

Q. Did you look around there?

A. Yes, we looked around there. We didn't see anything.

Q. Then what did you decide to do?

A. We started to head back towards San Pedro in a westerly direction there.

Q. In what direction?

A. A westerly direction towards San Pedro. We were coming from the east end of Catalina there. We didn't decide on going home yet, we just headed that way.

Q. You headed in a westerly direction?

A. Yes.

Q. Then what did you do? When did you decide to go home?

A. We looked around for fish there and we went towards the east end. We didn't find anything so we

(Testimony of Anthony Di Leva)

came back in the direction we were going, in a westerly direction, and we were headed on our way home and all of a sudden we were hit on the starboard side.

Q. What direction did you put your boat in when you headed for home? [101]

A. You put them in a northwesterly direction heading for San Pedro.

Q. That is on a direct line from the east end of the Island to San Pedro? A. Just about.

Q. That is the direction you headed your boat?

A. Yes.

Q. Did you see any other boats around there at that time?

A. When we approached the Island we seen the Bessemer. We seen them over there.

Q. You saw a light from the Bessemer?

A. Yes, we seen his green running light. That is all we saw.

Q. You saw his green running light?

A. That is right. His bow was in an easterly direction.

Q. Did you at any time see the red running light of the Bessemer?

A. No, sir. The only time we seen his red light was when we collided, when he come in and hit us.

Q. At what distance was the Bessemer when you saw this green light? A. At first?

Q. Yes. [102]

A. When we come to the Island?

Q. Yes.

A. I would say we were about a mile away from him.

(Testimony of Anthony Di Leva)

Q. You saw the green light from about a mile away?

A. Yes.

Q. And you proceeded on your way to San Pedro?

A. No, we come to the Island. We proceeded towards the east end looking for fish.

Q. Supposing you go down here to the blackboard and draw a similar diagram to the diagram that has been drawn by the libellant.

If the Court please, may I mark this libellant's?

The Court: That is Exhibit No. 2. Yours will be Exhibit A.

By Mr. Toner:

Q. Now we are using the red crayon for the Gloria R and the blue crayon for the Bessemer. Will you draw in the island roughly about the same size as the libellant has drawn it, and put an "N" to indicate north?

A. (Drawing on blackboard)

Q. Now will you point out the approximate position of the Gloria R when you decided to go home?

A. We did not have no say-so about going home, we just headed our bow in a westerly direction.

Q. When you decided to head toward San Pedro, about [103] where were you?

A. It would be better if I draw how we approached the island first.

Q. Surely.

A. We were coming up from this direction here, we headed towards the east end, and we got down here. (Indicating)

Q. Mark that a little heavier.

A. When we approached pretty close to the power plant down there, as soon as we got down there we didn't

(Testimony of Anthony Di Leva)

see any signs of fish so we swung around and headed back in this same direction. (Indicating)

Q. Then where was the Gloria R when you saw the Bessemer's green light?

A. When we first seen the Bessemer, it seemed like he was in that sort of a direction, in an easterly direction. (Drawing on blackboard)

Q. Would you draw in the contour of the boat a little better—make it sort of a—that is fine.

A. (Drawing on blackboard)

Q. And mark that position.

The Court: Where were you?

The Witness: At the time we first seen them?

The Court: When you first saw the Bessemer. Just mark it with a cross. [104]

The Witness: We were about right here because we seen his green light there. (Indicating)

The Court: Mark that position No. 1.

The Witness: (Drawing on blackboard)

By Mr. Toner:

Q. When you were down at the bottom of that chart and turned in the direction towards San Pedro, mark that position No. 2. A. Right down here about?

Q. Yes.

A. (Drawing on blackboard)

The Court: Where was the Bessemer then?

The Witness: To us he seemed like he was always in the same position there. All we seen was his green light. That was all we seen of him.

(Testimony of Anthony Di Leva)

By Mr. Toner:

Q. Just describe and draw a line indicating your course as you proceeded.

A. As we proceeded?

Q. Yes.

A. We were proceeding outwards here. (Indicating)

Q. Now when you approached the Bessemer, did the Bessemer make any turn or change in course?

A. Well, the only time we noticed that he turned is when he was so close that we had no chance to turn at all and [105] we were about—I would say we were about right here.

The Court: Mark that No. 3.

The Witness: (Drawing on blackboard)

The Court: Where was the Bessemer then?

The Witness: The Bessemer was always in that sort of a direction; it seemed like he was swinging toward us.

By Mr. Toner:

Q. Will you draw in in blue the course of the Bessemer and what did the Bessemer do and which way did it go?

A. He sort of swung along like this here—this should be a little bigger here. (Drawing on blackboard)

Q. How far off were you when the Bessemer made the turn that you had last described?

A. I would say it wasn't more than a hundred feet. He was pretty close to us.

Q. What did you do at the time when he turned toward you?

A. We were proceeding on a course there, and we figured, well, since he was heading in an easterly direction there that we would clear his stern and proceed right

(Testimony of Anthony Di Leva)

on our course there. Instead, all of a sudden, we see both of his running lights red and green right on us amidship, and we had nothing to do but keep on going.

Q. What did you do then?

A. We had to just keep on going. We sort of swung a [106] little and we seen we were so close to avoid the accident, but we couldn't avoid no accident.

Q. How far away was the Bessemer from the Gloria R when you saw both running lights?

A. Oh, I would say about 30, 40 feet. They were pretty close to each other.

Q. Did the Bessemer have any red light on the mast?

A. No, it had no red light on the mast.

Q. Before I go into that, what part of the Bessemer and what part of the Gloria R came into being with each other?

A. Well, the Bessemer, he hit us with his bow right where the rigging is, right amidship on the starboard side. We were proceeding out in a westerly direction, he swung around and hit us right amidship, right where the rigging is. That is where the smash was on the Gloria R.

The Court: Did you see both red and green lights at the time of the smash?

The Witness: Oh, yes. I was on the mast. I could see the boat coming right at me. It hit me right square in the rigging there.

By. Mr. Toner:

Q. Are you familiar with the custom in the San Pedro area with reference to red lights on the mast?

A. I am.

(Testimony of Anthony Di Leva)

Q. What does the red light on the map indicate? [107]

A. Well, when you put your red light on you are showing to the other boats, if there is any boat around, that you are on fish. That red light is sort of a warning that that boat is to stand clear of you, in a radius which your net would cover. You put that on before you set. We always do and I think there is a lot of boats that do, and I think that is the proper procedure, not when you lay your net in. When your circle around the fish, you see it is a proper school to set on, you are going to make a haul, you put your red light on.

Q. What does that tell to the other fishermen?

A. If there is other boats approaching it is to show that you are on fish.

Q. What does it tell you?

A. To stay away, stand clear of them, he is going to lay his net out.

Q. Is that common practice in the San Pedro area?

A. I see that going on every night when we are fishing.

Q. How fast was the Bessemer going before the collision?

A. I couldn't say. I wasn't on the Bessemer. But I don't think he was going too fast.

Q. About how fast in miles per hour, about?

A. He must have been doing at least two knots.

Q. How fast was your vessel going? [108]

A. About eight.

Q. Could you have cleared the stern of the Bessemer had the Bessemer not made this turn?

A. We could have cleared them easily.

(Testimony of Anthony Di Leva)

Q. About how many feet?

A. Oh, a good 50 feet, cleared his stern, we could have passed right off his stern.

Q. Are you familiar with the custom with reference to the direction a fishing boat circles fish?

A. Yes, I am.

Q. What is the custom?

A. We circle counter-clockwise, always towards your port. Very seldom do you circle it clockwise.

Q. What is the reason for circling counter-clockwise?

A. Because that is the way you lay your net out. All your gear is on that side of the boat. You lay it around to your port side, you swing always port.

Q. How many circles around the school of fish is usually made?

Mr. Lande: I object to that, your Honor, no foundation laid for such a thing that there is a usual number of circles to be made around a school of fish. It assumes a fact not in evidence.

The Court: It would be very interesting about fish if there was any usual number of time to go around them, but I do not know. Maybe there is. Objection overruled. [109]

The Witness: You can go around as many times as you want.

The Court: The long and short of it is that you circle until you decide it is a good place to lay your net and then if you do you lay it?

The Witness: That is right.

The Court: If you do not, you circle it some more until you find out what is there?

The Witness: That is right.

(Testimony of Anthony Di Leva)

By Mr. Toner:

Q. There is another purpose for circling a school of fish?

A. Sometimes the fish is spread apart and you circle them to try to bunch them up together.

Q. Tony, when you came up there and expected to pass the Bessemer, did you see any schools of fish?

A. No, we didn't see any fish at all. That is why we were headed back out on the way home.

Q. Did you see any school of fish in the vicinity of the Bessemer?

A. We didn't see any. We thought he was just lying adrift with his bow in an easterly direction. He had no red light on saying he was on fish.

The Court: Did you see his skiff out?

The Witness: His skiff? [110]

The Court: Yes.

The Witness: All the boats were running around. We have our skiff hanging on the stern.

The Court: Did you see his skiff on the side?

The Witness: I wasn't paying much attention. I didn't see his skiff because we were looking for fish.

By Mr. Toner:

Q. When you are looking for fish you have the skiff ready to lay the net?

A. Oh, yes. That is put in the water before you even start looking for fish.

Mr. Toner: I think that is all.

The Court: Cross-examine.

(Testimony of Anthony Di Leva)

Cross-Examination

By Mr. Lande:

Q. Tony, you say you saw the Bessemer just lying there and you thought she was just drifting, is that right?

A. That is what she seemed to us. She was always in one position with her bow in an easterly direction.

Q. Now, Tony, isn't it a fact that you saw the Bessemer circling around the fish there?

A. I never said I seen the Bessemer circling around fish.

Q. Do you recall your former trial in this case on May 16, 1946? [111]

Mr. Toner: What page, counsel?

Mr. Lande: Page 47.

Q. I call you attention to that page and line 16.

The Court: Read it to yourself. Then he will ask you questions.

By Mr. Lande:

Q. You testified at that time as follows:

"Well, he was circling around the fish here * * *"

Did you not so testify?

A. That happened three years ago on the stand and I can't remember that far. Here it is three years later.

The Court: Just a moment. Did you or did you not so testify?

Mr. Toner: Just a moment. May we have the full quotation read, including line 21, where he claims he was circling on fish?

The Court: Read the whole answer in the record.

(Testimony of Anthony Di Leva)

Mr. Lande: May we go back a little here then?

"The Court: Did you get fairly close to the Island?

"The Witness: Well, we come out here. The Bessemer claims he was circling around fish about here, a circle like that.

"The Court: What is that circle? [112]

"The Witness: He said he circled around the fish.

"Mr. Toner: I think we had better use the red crayon for the Gloria R and the blue crayon for the Bessemer.

"The Witness: We come out here close to the Island, towards the east end there and did not find anything, so we headed out. We kept on a course straight out to San Pedro here and we headed for San Pedro. This would be the Gloria R like that. Well, he was circling around the fish here and he was looking more to the east—his bow towards the east. We could only see his green light at all times. That is all we seen was a green light and the only light he could see of ours was our green light on this side because our red one would be over here. He claims he was circling on fish. When we are circling on fish the regulation, the way we do it, we put a light on warning the boats, a red light, and he had no red light on, so we kept on traveling straight out this way towards San Pedro and he says that later on he turned to his starboard.

"The Court: I don't care what he said; tell us what happened. [113]

(Testimony of Anthony Di Leva)

"The Witness: All right. So we kept going. We got out to about this here position, out here, and he kept running a little ways, circling on the fish. As soon as we get over here we seen this boat. He said he turned to the starboard. He turned to the starboard. We kept going a little ways. He says he threw it in reverse. We kept our same course without changing. The only time we changed our course was when the accident could not be avoided. We turned to the port. If he had turned port, too, it would have avoided the accident because us turning to port we would go that way and his turning to port he would go this way."

Q. You testified that way on the previous trial, did you not?

A. I guess that is right, if it is written in the book. It happened three years ago. I testified on the stand three years ago.

Q. Mr. Di Leva, you saw the Bessemer at all times that you were around the east end of Catalina Island, did you not?

A. We were on the east end of Catalina Island.

Q. And you saw the Bessemer at all times?

A. Not at all times. I was looking for fish. We swung around, and you would see them out there. All we noticed would be his green light. Always toward an easterly [114] direction he was headed.

Q. I will show you on page 48, lines 23 to 25, and ask you to read these lines.

A. (Examining transcript) I just said that, didn't I? We seen the Bessemer all the time.

The Court: What page is that, counsel?

(Testimony of Anthony Di Leva)

Mr. Lande: Page 48, your Honor, lines 23 to 25 inclusive. May I read it into the record?

The Court: Yes.

Mr. Lande: "The Court: But you saw the Bessemer at all times?

"The Witness: Yes, sir. We seen the Bessemer all the time."

The Court: Then on page 49, did you show him that also?

Mr. Lande: Yes. I would like to show him page 49 too.

Q. Will you read on page 49 down to line 14, lines 1 to 13 inclusive.

A. (Examining transcript)

Q. Do you remember so testifying, Mr. Di Leva?

A. I can't swear to that because, you see, that happened three years ago.

The Court: Did you so testify? Is that what you said at the previous trial?

The Witness: Yes, your Honor, because it is in the book there. [115]

Mr. Lande: May I read it? Reading from page 49:

"Q. By Mr. Toner: How large a circle was he making here around the fish?

"A. Well, the average circle. When you set around fish that is about the size there.

"Q. How big is that?

"A. Oh, about 240 fathoms.

"Q. That is how many feet?

"A. (No answer)

(Testimony of Anthony Di Leva)

“Q. About 1440 feet?

“A. While he was circling on the fish then he said he turned hard starboard—starboard would be leading to his right and that way he led right into us and he hit us right amidship.”

Q. Now, Mr. Di Leva, at the time you were along the east end of Catalina Island and you had come in a northwesterly direction, then you turned and was heading up towards San Pedro, and all that time you saw the Bessemer circling around that school of fish very slowly, didn't you?

A. Circling around the fish?

Q. Around the fish.

A. We were looking for fish. I was on the lookout looking for fish. Once in a while you would look over that way and see this boat, the Bessemer, see his green light always. He claims he was circling on fish. [116]

Q. He was proceeding very slowly, was he not?

A. To us he seemed like he was proceeding slowly, more like he was still though.

Q. When you came up to go home you could as well pass 300 or 400 yards to the west or half a mile to the west or a mile to the west of where the Bessemer was circling on the fish, could you not?

A. We didn't know the Bessemer was circling on the fish.

The Court: The question is, whether or not you could have taken a different course.

The Witness: We could have, but that was a proper way to head back home because from the position we came in.

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. But you knew that that course would bring you close to the Bessemer, did you not?

A. Oh, sure, we came in. We passed a mile away from it going out in that same direction and we would have cleared him by plenty of room. There were only tow boats there, you know.

Q. Now in relation to this alleged custom of putting on the red light at the time they are dropping the nets, or before they are dropping the nets, isn't it a fact that they also just as often put the red light on as they drop the net in the water and the net is in the water? [117]

A. Some do, some don't. It is a custom the way you work, but the proper procedure is before you lay out to warn the boat you are supposed to put your red light up.

Q. I didn't ask you what your opinion of the proper procedure was, I asked you what was usually and customarily done. Is it fair to say that it is usual and customary that it can be done either way?

A. No, I think the way we always done it, and the way I have always seen it, you put the red light up when you are on fish.

Q. Referring to your testimony on page 58, lines 5 to 9—

A. You are bringing facts to me, things I said three years ago when the trial was fresh in my memory. Now it is three years later.

(Testimony of Anthony Di Leva)

Q. Will you read lines 5 to 9, please, on page 58?

A. (Examining transcript)

Q. Did you so testify at that time?

A. It is written in the report. I guess I did.

Mr. Lande: May I read it into the record.

"The Court: Sometimes they put it on just before they drop the nets too, do they not?

"The Witness: Yes.

"The Court: They do it both ways?

"The Witness: Yes, that is right." [118]

Mr. Toner: May I have the following five lines read into the record too?

Mr. Lande: All right.

"The Court: The fact there was no red light would not indicate that the Bessemer was not going to drop its net?

"The Witness: He claims he was on fish. He seen we were there. Why didn't he warn us that he was on fish so we could stay away from him?

"The Court: Why didn't you stay away from him?

"The Witness: We did not know he was on fish.

"The Court: You saw him there and you saw the boat. You had the entire ocean there.

"The Witness: That is right. We were headed straight out north to San Pedro. We would clear him. We weren't going to hit him. We were going to pass the stern of him. He would have been laying like this and we pass on the stern of him going to San Pedro.

(Testimony of Anthony Di Leva)

"Q. By Mr. Lande: You could have just as well gone to San Pedro and passed a couple of hundred yards astern?

"A. We happened to be on that course and kept going on it. [119]

"Q. And you did not bother to move over to give him a wide berth, then, did you?

"A. Well, how do we know he is on fish?" Do you wish any more read?

Mr. Toner: The next question and answer.

Mr. Lande: All right.

"Q. You saw him circling, didn't you?

"A. No, we didn't. We just seen his green light.

"Q. Haven't you got your diagram there indicating that the Bessemer was circling?

"A. He claims that is what—he says—he claims he was circling on the fish. I did not say I seen him.

"Q. Well, you saw him some time before the collision, didn't you?

"A. Yes, we passed—we passed on the outside of him. We seen his green light just like he says here."

I have no further questions, your Honor.

Mr. Toner: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Toner: I would like to call Jacob Pugliese. [120]

JACOB PUGLIESE,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Jacob Pugliese.

The Clerk: Will you spell your last name?

The Witness: P-u-g-l-i-e-s-e.

The Clerk: Your address?

The Witness: 635 West 17th Street.

The Clerk: Is that San Pedro?

The Witness: That is right.

The Clerk: Take the stand.

Direct Examination

By Mr. Toner:

Q. Mr. Pugliese, what is your occupation?

A. I am a fisherman.

Q. How long have you been a fisherman?

A. I have been fishing since 1936.

Q. Were you aboard the Gloria R on October 4, 1944?

A. I was.

Q. At the time they had a collision with the Bessemer?

A. I was.

Q. In what capacity were you on the Gloria R?

A. You mean my job? [121]

Q. Your job. What did you do?

A. I was just a deckhand.

Q. A fisherman? A. A fisherman.

Q. Are you familiar with fishermen's custom in San Pedro area with reference to the use of a mast light?

A. I am.

(Testimony of Jacob Pugliese)

Q. Will you describe the custom to the Court?

A. Well, usually when a boat finds fish he puts his red light on. I have seen boats run all night with a red light on a school of fish. Sometimes they find a school of tuna and stay on it four or five hours with a red light to keep warning the other boats to keep away from it.

Q. What does the presence of a red light on the mast of a fishing boat indicate?

A. It indicates either the boat has got its net in the water or he is going to lay out.

Q. Does it indicate anything to the other boats?

A. It is a warning for the other boats to keep away.

Q. When is the red light put on, did you say?

A. When you are going to set.

Q. Is there any custom in the San Pedro area with reference to the direction in which a circle is made around a school of fish?

A. Well, from the experience I have had, why we have [122] always turned counter-clockwise on fish.

Q. When you come up to a boat, would you normally expect that boat to circle a school of fish clockwise or counter-clockwise?

A. No, I guess it could happen, but it is not very ordinarily that they do. Always to the right. Usually when a skipper find a school of fish, when he finds it the first time, to get his position again he has to make one complete circle hard over, counter-clockwise, to bring him back to the same position again.

Q. You said a circle to the right. What did you mean?

A. I mean counter-clockwise.

(Testimony of Jacob Pugliese)

Q. So that he has actually got the bow of his boat going towards the port, or left?

A. That is right.

Q. Where were you on the Gloria R at the time of the collision?

A. I was on the forward end of the boat, the bow.

Q. What did you see as the Gloria R proceeded towards San Pedro?

A. Well, I was standing on the bow and we were running northerly just a little—I couldn't tell you exactly because I wasn't on the compass—but I figured about a northerly direction, and all I could see was the green light of the Bessemer. [123]

Q. What would that indicate to you?

A. That would indicate that he was running easterly.

Q. Was the green light moving or was it stationary?

A. It is hard to tell. According to the way they say they were running at a slow speed and I couldn't tell very well .

Q. Was it dark at the time?

A. It was dark. The moon was up though.

Q. Could you see the loom of the boat or the shape of the boat? A. Just faintly.

Q. But you did see the green light?

A. Just the green light.

Q. That means you saw the right-hand side or star-board side of the boat? A. That is right.

Q. And if you were going north that boat would necessarily be headed east? A. That is right.

(Testimony of Jacob Pugliese)

Q. Did you at any time prior to the collision see the red light of the Bessemer?

A. No, at the beginning of the fight, when he got there I seen his red light but prior to the collision I didn't see no red light at all. The only red light I seen is when he hit us amidship. [124]

Q. Whereabouts on the Gloria R did the Bessemer hit?

A. Where did he hit the Gloria R?

Q. Yes. A. Right amidship.

Q. Now pointing to this model, will you show the Court just the approximate position?

A. He hit us just a little aft of the stays. (Indicating)

Q. And the stays are the—

A. Guide lines from your mast to the sides.

Q. Did the Gloria R receive quite a jolt or was it a slight bump?

A. Well, I don't know. They say they were going about two miles an hour, but that boat it just about knocked me overboard. I was holding onto a rope when we hit.

Q. Was it a heavy blow?

A. I think it was a good hit that was going at least four to five knots. It just about capsized us.

Q. What did the Gloria R do after the collision?

A. He just slowed us down completely.

Q. Where did the Gloria R stop with reference to the vessel?

A. The way he hit us. He just stood right there and started arguing from there on. The boat didn't go away from that position. It just stood in exactly one position. [125]

(Testimony of Jacob Pugliese)

The Court: Still arguing?

The Witness: Still arguing.

By Mr. Toner:

Q. As you approached the area in which the Bessemer was prior to the collision, would you say that the Bessemer made a turn or did she continue going straight ahead?

A. Well, he made a semicircle turn, a half-circle.

Q. So that when you saw his green light he was going in an easterly direction?

A. That is right. Well, he could still be going westerly and still see his green light. You don't have to be going completely east.

Q. How would that happen?

A. Well, if we would be on the starboard side of him his green light would be facing west, and that is all we seen. We couldn't see his red light until he approached us headon. That is the only way we could have seen his red light.

Q. What did you see at the time he approached headon?

A. I could see both lights red and green.

Q. Did you at any time prior to the collision see both lights?

A. No, I did not. I couldn't see his lights.

Q. Why couldn't you see the red light?

A. Because he was making a complete circle. You know, your running lights, your green light and red lights, they [126] don't show back, they only show off a 10 degrees angle. That is not to confuse the other boats behind you. And we couldn't see his red light at all.

(Testimony of Jacob Pugliese)

Q. Will you point out on this model just about the approximate position that you were in?

A. You mean where I was standing?

Q. Where you were standing.

A. When I first seen the boat I was standing right here. (Indicating)

Q. Indicating a point a little forward of the—

A. Pilohouse.

Q. —pilohouse on the port side? A. Yes.

Q. Then where did you go?

A. Well, I figure I didn't want to be on the bow when we got hit, so I ran down here, and there was a line from our skiff, our line from the winch to the skiff, so I just held on because I seen everything right from there just facing me.

Q. Did you hear any whistle blown on the Gloria R?

A. He blew two whistles after we got hit.

Q. Are you sure that was after the collision?

A. After the collision.

Q. How long after the collision?

A. Just exactly after we hit him. I don't know if the [127] mast had anything to do with it, with a loose rigging to pull a line and shake it back and forth, I don't know, but we heard two whistles.

Q. Did you hear anybody hollering on the Bessemer?

A. I heard them hollering just before we hit.

Q. How long before you hit?

A. Oh, just a second before we hit.

Q. Just a second before you hit?

A. Well, it might have been a couple of seconds.

(Testimony of Jacob Pugliese)

Q. A couple of seconds at most?

A. It takes you a couple of seconds to think.

Q. At least it would be a couple of seconds that you heard hollering?

A. Yes.

Q. Do you know who it was who was hollering?

A. No, I couldn't tell. There was a bunch of them hollering.

Mr. Toner: I believe that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Lande:

Q. Mr. Pugliese, did you see the Bessemer circling around a school of fish when you were off the east end of the Island?

A. I couldn't say he was circling a school of fish. I don't know if he was on fish or not. [128]

Q. You saw him?

A. I seen a boat.

Q. And it was going very slowly?

A. I couldn't tell. Nobody can estimate speed at night.

Q. How far away were you?

A. Well, I couldn't tell you exactly how far.

Q. Were you a mile, two miles away?

A. I would say less than a mile.

Q. And then your boat turned around and headed northwest towards San Pedro, is that right?

A. I didn't say that. The only thing I can recall, that I paid any attention to, is that we had our bow in a northerly direction.

Q. You headed your bow in a northerly direction?

A. That is right.

(Testimony of Jacob Pugliese)

Q. You saw the Bessemer ahead of you then?

A. I didn't see them ahead of us; I seen him on the starboard side of us.

Q. But you saw the vessel ahead of you, you say, on the starboard side?

A. He was not ahead of us. He was on an angle from us.

Q. Well, he was northerly of you then?

A. I wouldn't know. I would not say that. I would [129] say he would be easterly from me.

Q. He was northeasterly, in fact?

A. That is right.

Q. Then your vessel went from the position it was in right up to where he was?

A. Oh, no. I didn't say that. I said we had our course going one way, he made a semicircle.

Q. Did you change your course any?

A. No, we did not.

Q. Right before the collision didn't your vessel put hard to port?

A. No, we didn't hard to no place.

Q. Your vessel didn't turn hard to port prior to the impact? A. How do you figure hard to port?

Q. I mean, turned hard to port.

A. We were on our course.

Q. Right before the two vessels came together, didn't you turn?

A. I couldn't tell you exactly that minute. I can't see the rudder turn.

Q. But you felt, or knew that your boat was turning?

A. I knew we were going to get hit.

Q. You knew your boat was turning?

A. I couldn't tell. [130]

(Testimony of Jacob Pugliese)

Q. Did you see the turn?

A. I did not see the turn.

Q. You don't know whether it turned or not?

A. I imagine it did but I couldn't tell. After he hit us it turned the whole boat around.

Q. You say you were on the port side?

A. That is right.

Q. And your vessel was hit extremely hard so that you almost fell over, is that right?

A. I didn't say I just about fell out. I wasn't on the bow when the boat got hit. I didn't say that. I was amid-ship.

Q. Didn't you tell us that the impact was such that you had a hard time keeping your feet?

A. That is right.

Q. What damage was done to your boat?

A. Not at all.

Q. As a matter of fact, just a guard-rail was hit?

A. As a matter of fact, the boat leaked before we got hit and never leaked after we got hit.

Q. Isn't a fact that your boat was not hit on the port side but was hit on the starboard side?

A. That is right.

Mr. Lande: That is all.

Mr. Toner: Just one question. [131]

Redirect Examination

By Mr. Toner:

Q. Jacob, you said that the force of the collision turned your boat around. Do you mean that the stern of your boat was pushed around towards the port side?

A. I would say that; yes.

(Testimony of Jacob Pugliese)

Q. In which direction were the two boats headed? Were they headed bow to stern and stern to bow after the collision?

A. No. After he hit us we were about at this angle (indicating) and he was just about straight dead on us. He didn't hit us square, he flushed us, he kind of side-swiped us, a hard sideswip, just pushed his whole bow stem off.

Q. Did you see any fish when you came up to the vicinity of the Bessemer?

A. No, we didn't see any fish at all. I was on the bow all night and didn't see a thing.

Q. Were there any fish there?

A. We didn't see any.

Mr. Toner: That is all.

The Court: Step down.

(Witness excused.)

Mr. Toner: I will call Mr. Gennaro Di Leva. [132]

GENNARO DI LEVA,

called as a witness by and on behalf of the respondents, having first been duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Gennaro Di Leva.

The Clerk: Your address?

The Witness: 660 West Ninth Street, San Pedro.

The Clerk: Take the stand.

Direct Examination

By Mr. Toner:

Q. Gennaro, what is your occupation?

A. Fisherman.

(Testimony of Gennaro Di Leva)

Q. How long have you been a fisherman?

A. Forty-three years.

Q. And you were one of the parties to this action before the judge ordered it dismissed against you?

A. I don't understand what you say.

Mr. Lande: That is a matter of record. We don't have to ask him for a legal statement.

Mr. Toner: I want to know if it is the same party.

Mr. Lande: So stipulated.

By Mr. Toner:

Q. Gennaro, are you familiar with the fishermen's custom in and around the San Pedro area?

A. Yes, sir. [133]

Q. And is there any custom with reference to the use of the red mast light?

A. All fish in a school of fish, you have got to have a red light on the mast, right in here. (Indicating)

Q. What does that mean.

A. That mean if I see other boat around you got to stay away.

Q. You mean it warns the other boats to keep away?

A. Yes, you have to stay away from them.

Q. When do you put that red light on?

A. When you see another boat around and you suppose when he hit the fish you put the red light on the mast, then the other boat stay away from you.

Q. Is that red light put on when you are on fish?

A. Yes.

Q. Does that indicate to other fishing boats in the neighborhood that you have a school of fish there?

A. Yes.

(Testimony of Gennaro Di Leva)

Q. And you want the others to stay away?

A. That is right.

Q. What is the customary direction that a fishing boat uses to circle a school of fish?

A. Well, sometimes you don't, sometimes you do. Sometimes you make one circle, maybe two more, when you see a school of fish. When you do you make half a circle and he [134] sets the net. There is no use to circle a dozen times. When you see a school of fish you know what direction to go.

Q. One more question. You weren't on board the Gloria R?

A. No, I was sick at home. I had an operation. I didn't know nothing about the Gloria R.

Mr. Toner: That is all.

Mr. Lande: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Toner: I call Nicola Curci.

NICOLA CURCI,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Nicola Curci.

The Clerk: Will you spell it?

The Witness: N-i-c-o-l-a, C-u-r-c-i.

The Clerk: Your address?

The Witness: 545 West Eighth Street.

(Testimony of Nicola Curci)

The Clerk: San Pedro?

The Witness: Yes.

The Clerk: Take the stand. [135]

Direct Examination

By Mr. Toner:

Q. Nick, what is your business or occupation?

A. I am a fisherman.

Q. How long have you been a fisherman?

A. About 15 years.

Q. Are you familiar with fishermen's customs with reference to the use of the mast light?

A. Yes. Before any boat—before you see fish you have, right away you see the fish, you have to have a red light on top of the mast.

Q. What does the red light indicate?

A. It mean the other boat has to move from you, you got to give distance on each other, you know.

Q. Were you a member of the crew of the Gloria R at the time of the collision with the Bessemer?

A. I was member; yes.

Q. What position on the boat did you have at the time of the collision?

A. I sat alongside the locker room.

Q. Where were you?

A. Up on here. (Indicating)

Q. On the cabin? A. Cabin.

The Court: On top of the cabin? [136]

The Witness: Yes.

By Mr. Toner:

Q. There are controls outside on the roof of the cabin? A. I was on the other side.

(Testimony of Nicola Curci)

Q. You were standing next to Biago? A. Yes.

Q. And Biago was at the wheel? A. Yes.

Q. What were you doing?

A. Just sitting down, you know, smoking.

Q. Were you looking for fish?

A. Looking for fish, that is all.

Q. You were the lookout?

A. Yes, looking for fish.

Q. Do you recall that Tony said that you got down to the east end of Catalina Island? A. Yes.

Q. Then what did you do?

A. The moon come up, Biago says we got to go home, and he said put north by a little bit west. We are going straight to Pedro.

Q. Then what happened?

A. And on the way up he seen a green light.

Q. How far off was the green light?

A. About one mile, about 200 yards, one mile, I don't [137] know. It is three years ago and I don't remember for sure.

The Court: 200 yards to a mile?

The Witness: 200 yards, maybe one mile. I don't know.

By Mr. Toner:

Q. You don't know how far off that green light was?

A. I think one mile.

Q. One mile? A. Yes.

Q. And where was it with reference to your boat? What angle was it on? Was it dead ahead or was it off the starboard bow or what?

A. What do you mean, starboard bow?

Q. What angle to your course did you see it?

(Testimony of Nicola Curci)

A. North by west a little bit. She is going to Pedro.

Mr. Vermille: We have an interpreter here.

The Court: Do you want an interpreter?

Mr. Toner: Yes.

The Court: Do you understand what is going on?

The Witness: I don't understand very much, just a little bit.

Mr. Toner: I would rather have an interpreter, if the Court please. I didn't realize he was having difficulty.

The Court: I think he understands. Go ahead if you want one. He will have to be sworn.

(At this point Mike Liddi was duly sworn by the Clerk [138] to translate from the English language into the Italian language and vice versa.)

The Court: This is the Italian language you are translating?

Mr. Liddi: I will do the best I can.

By Mr. Toner:

Q. What bearing to the course of the Gloria R was the green light that you saw?

The Interpreter: He says the distance?

The Court: No, the bearing.

The Witness: About 200 yards.

By Mr. Toner:

Q. What angle was the Gloria R's course to the direction in which the green light appeared?

A. When they had the green light?

Q. Let's get at it this way. Was the green light straight ahead of the Gloria R?

A. I see all the time the green light. That is all I see.

(Testimony of Nicola Curci)

Q. Was the green light to the left or to the right of the course of the Gloria R?

A. Left; this side. (Indicating)

The Court: That is the right side. Ask him if it was port or starboard. [139]

By Mr. Toner:

Q. Was the green light to the port or to the starboard from the Gloria R's course?

A. The green light of the Gloria R, when you go to Pedro it is on this side.

The Court: By "this side" indicating the starboard side.

By Mr. Toner:

Q. Did you ever see the red light of the Bessemer?

A. No, I never seen the red light. I see the red light when the boat was close.

Q. How far off was the Bessemer when you saw the red light? A. Oh, pretty close.

Q. How close?

A. Oh, about, I don't know, 20 yards.

Q. Twenty yards? A. Yes.

Q. What direction was the Bessemer going at that time?

A. I think it is going to Avalon, he is going straight to Avalon.

Q. Where was your boat hit?

A. This side, going to Pedro this side.

Mr. Toner: Indicating the starboard side.

The Court: Starboard amidship. [140]

Mr. Toner: Starboard amidships near the stays.

That is all.

Mr. Lande: No questions.

(Witness excused.)

The Court: Next witness.

Mr. Toner: I will call Biago Cummo.

The Court: We might have a short recess here.

(Short recess.)

Mr. Toner: If the Court please, with reference to the structure of these fishing boats, particularly the screens around the lights, I believe the Court can take judicial notice that the running lights are visible from dead ahead to two points abaft the beam.

I believe counsel would stipulate to that.

The Court: Is that right?

Mr. Lande: I really don't know, your Honor.

The Court: Where would two points abaft the beam be?

Mr. Toner: That is an angle of $22\frac{1}{2}$ degrees. The beam is on a 90 degree angle. Two points abaft the beam is $22\frac{1}{2}$ degrees. There are 32 points in the full 360 degree compass.

The Court: In other words, it is 20 degrees off the midline of the ship?

Mr. Toner: No, it is 20 degrees off athwartships.

Mr. Lande: There is a difference between degrees and points, counsel. [141]

Mr. Toner: Yes, I know. It is 22 points. The statute so provides, that the running lights shall be visible not further aft than two points abath the beam.

The Court: Where is the two points abaft the beam on the model?

Mr. Toner: That is 22 points. (Indicating)

The Court: Point out where that would be.

Mr. Toner: It is about this way. That is covered in the International Rules.

The Court: Very well. Then it is two points stern-wise?

Mr. Toner: That is correct.

The Court: From a 90 degree angle to the light?

Mr. Toner: That is right.

Mr. Lande: That is right.

Mr. Toner: And the green light is not visible to the port side of dead ahead and the red light is not visible to the starboard side of dead ahead, because the inboard screen is parallel to the fore and aft line of the vessel. That is likewise a statutory provision.

The Court: From dead ahead you can see both lights?

Mr. Toner: Yes, but you cannot see the green light to the port side of dead ahead and you cannot see the red light to starboard of dead ahead. In other words, when you see both lights—

The Court: That means you are dead ahead? [142]

Mr. Toner: Yes. And when you see one light it is to whichever side it may be.

The Court: I see.

Mr. Toner: I will call Biago Cummo.

BIAGO CUMMO,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Biago Cummo.

The Clerk: Your address?

The Witness: 383 West Ninth Street.

The Clerk: San Pedro?

The Witness: Yes.

Mr. Toner: The interpreter has already been sworn.

The Court: Do you need an interpreter?

The Witness: Yes.

Direct Examination

By Mr. Toner:

Q. Biago, what is your business or occupation?

A. Fisherman.

Q. How long have you been a fisherman?

A. Since I was young fellow, since I was real young fellow. It is about 37, 38 years ago I have been fishing.

Q. Are you familiar with the fishermen's custom in [143] the San Pedro area with reference to the use of a red mast light?

A. Yes.

Q. Will you describe that custom?

A. The red light on the mast means when the boat has found the fish and it is ready to lay the net for the fish.

Q. What position did you have aboard the Gloria R at the time it was in collision with the Bessemer?

A. I was close to the wheel light. I was the wheelman.

(Testimony of Biago Cummo)

Q. Will you describe the collision and events preceding the collision with the Bessemer? A. Yes.

Q. Go ahead and describe in your own words what happened.

A. Before the accident we were going north, going towards San Pedro, a little further west.

Q. Then what happened?

A. And then we saw that green light that was going east.

Q. Then what happened?

A. And then I saw the red light and the green light. That is the time when they hit us.

Q. What did the boat that you saw do? What did the Bessemer do? [144] A. He hit us.

Q. Did he make any turns?

A. He hit us and then he tried to back out at the same time, when he hit us by hitting us the boat itself backed out.

Q. What direction was the Bessemer headed in when he hit you?

A. We were going north and they came around that way, as I said before, and they hit us right amidship.

The Court: Did he cut across the Gloria R's bow?

The Witness: Well, he was going east, as he turned he hit us amidship.

By Mr. Toner:

Q. Did the Bessemer cross your bow before the collision when he was going east?

A. By seeing the green light; I saw the green light. That was a sign that the boat itself was going east.

The Court: Did the Bessemer cross the bow of the Gloria R before the collision?

(Testimony of Biago Cummo)

The Witness: When we saw the green light it was ahead of us; it was going east ahead of us.

The Court: Can you tell us if he crossed the bow?

The Interpreter: I can only ask one question at a time, your Honor.

The Court: I would like to have him answer the question [145] yes or no as to whether or not the Bessemer crossed the bow of the Gloria R before the collision.

What did he say?

The Interpreter: He still insists that he saw the light, the green light, ahead of us. He says, I saw the green light ahead of us.

By Mr. Toner:

Q. What direction was the green light going when you saw it ahead of you?

A. The boat, the Bessemer, it was kind of facing the bow going east at the time I saw the green light before the collision.

The Court: When he first saw the green light on the Bessemer was it to his port or starboard side?

The Witness: The Bessemer was ahead of us.

Mr. Toner: I believe he said dead ahead.

The Interpreter: He says the right-hand side. It must have been the starboard side.

The Court: All right. Is that what he said, the right-hand side?

The Interpreter: That is what he said, sir.

The Court: All right.

Mr. Lande: Mr. Di Leva says that the witness says he saw the green light straight ahead of him, which would be going in this direction. He could be coming up

(Testimony of Biago Cummo)

from this [146] direction here. They were coming up in this direction.

The Court: I know, but we are talking about the port or starboard side of the boat. If you project the middle line of the boat, was the Bessemer on his port or starboard side. He saw it one side or the other.

Mr. Lande: Or straight ahead.

The Court: Or dead ahead.

Mr. Lande: For instance, if your Honor was up in the bow of the Gloria R then the Bessemer would be dead ahead of him right now.

The Court: If you were the Bessemer this would be right ahead.

Mr. Lande: Yes.

The Court: That would be the starboard side, would it not?

Mr. Lande: Yes.

Mr. Toner: May I have the witness demonstrate with these two pencils?

Q. Biago, this pencil is the Gloria R and this pencil represents the Bessemer. We will put this pencil in the direction that the Gloria R was proceeding. I hand you the red pencil which will represent the Bessemer. Now place the pencil representing the Bessemer where the Bessemer was when you first saw it.

The Court: Just lay it down there. [147]

The Witness: (Illustrating.)

By Mr. Toner:

Q. That is when you first saw the Bessemer?

A. Yes.

The Court: Is that in approximately the right position?

(Testimony of Biago Cummo)

The Witness: Yes.

The Court: Tell us what happened.

By Mr. Toner:

Q. What is the distance between the Gloria R and the Bessemer at that time? A. About a mile.

Q. Now what happened?

A. He says he saw the green light. He thought it was going east. Then all of a sudden he saw the green light and red light and that is the time that it hit, by making the motion that he turned to the left this way. (Indicating)

Mr. Toner: That is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Lande:

Q. The Bessemer was slowly circling around fish, was it not—I will withdraw that.

The Bessemer was slowly circling when you saw her green light?

A. He claimed at the time that he hit us— [148]

Q. I mean at the time he first saw it. At the time he saw this green light when he said it was out in this position.

A. He claims that he thought it was going regular speed.

Q. Did he watch the Bessemer as it turned to the right as he has shown us?

A. He says I saw the green light and then all of a sudden I saw the red light and we begin to yell and holler.

(Testimony of Biago Cummo)

Q. When you came up from the position where you saw the green light, you were going about eight knots an hour, is that right? A. Our regular speed.

Q. Your regular full speed. And you saw tht Bessemer circling there or turning, did you turn your boat to the right so you wouldn't come so close to it?

A. He couldn't do it no more, he was too close.

Q. Before he came too close, when he was half a mile away—

The Court: A mile away he said.

Mr. Lande: A mile away.

The Witness: He said I couldn't turn any more. I was going straight ahead. I couldn't turn any more.

The Court: Ask him what he did when the Bessemer hit.

The Witness: We stopped and we went right close to see [149] what kind of damage we did.

The Court: What did you do when you saw the Bessemer was going to hit you?

The Witness: He says just didn't do anything.

The Court: Didn't do anything?

The Witness: No, sir.

The Court: You kept dead ahead?

The Witness: Yes.

The Court: Any more questions?

Mr. Lande: That is all.

Mr. Toner: No questions.

The Court: Step down.

(Witness excused.)

Mr. Toner: Mr. Gerstle, please.

FENTON K. GERSTLE,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Fenton K. Gerstle; G-e-r-s-t-l-e.

The Clerk: Your address?

The Witness: 1207 Banning; Wilmington, California.

Direct Examination

By Mr. Toner:

Q. Mr. Gerstle, what is your business or occupation? [150]

A. I am paymaster or settlement clerk for the Van Camp Sea Food Company.

Q. How long have you been so employed?

A. About 10 years. I have been with the company 12 years, but the last 10 at this particular job.

Q. Are you familiar with both the Bessemer and the Gloria R?

A. I know the boats. The company owns the boats.

Q. The Van Camp Sea Food Company owns both boats?

A. Yes, sir.

Q. Were both boats operated on the same plan at the time of a collision between the two vessels on October 4, 1944?

Mr. Lande: Objected to as calling for a conclusion of the witness. Let's have the facts as to what the plan was.

Mr. Toner: I am coming to that.

The Witness: They are operated on a share basis, if that is what you mean.

(Testimony of Fenton K. Gerstle)

By Mr. Toner :

Q. Were they operated on the identical share basis?

A. That varies with the number of men in the crew from one boat as to the other boat. There may be a fluctuation in that.

Q. That is the only difference?

A. That would be the only difference; yes, sir. [151]

Q. Will you describe what the share plan means?

A. Well, we have so much an amount of money as catch for the period. From that is deducted the fuel and oil and dockage and cleaning, if there is any, and incidental things that are in the usual contracts.

The Court: Groceries?

The Witness: No, sir.

By Mr. Toner :

Q. Groceries are deducted later on?

A. That is personal.

Q. After those deductions are made in the amounts for which Van Camp have made payment, then what is done with that?

A. That is divided into the number of shares that happen to fit that particular situation.

Q. What was the number of shares that the Bessemer had at that time?

A. I didn't look it up but I believe it was probably $5\frac{1}{4}$, and the net probably took $2\frac{1}{2}$ —pardon me—the net would take $2\frac{1}{2}$.

The Court: What was the total number of shares?

The Witness: I don't know. I don't remember the figures.

The Court: I thought it was stipulated that it was $18\frac{3}{4}$.

(Testimony of Fenton K. Gerstle)

The Witness: That is right, but that includes the crew. [152]

The Court: I understand. How is that divided, $2\frac{1}{2}$ shares for the net, 12 shares for the men?

The Witness: If there were 12 men in that particular amount of fish; yes, sir.

The Court: There were 13.

The Witness: Whichever the case is.

The Court: And an extra $\frac{1}{2}$ share for the master?

The Witness: That is right.

The Court: And $2\frac{3}{4}$ for the boat?

The Witness: That is right.

By Mr. Toner:

Q. An extra half share that went to the master was taken out of the boat's share?

A. That is taken out of the company's take; yes, sir.

The Court: The boat's share?

By Mr. Toner:

Q. Do you mean by that the boat's share?

A. Yes, sir. The company gives that to him for supervision of the boat.

The Court: Was that same thing true of the Gloria R with regard to the precise number of shares, the same scheme?

The Witness: The same scheme; that is right.

By Mr. Toner:

Q. Now when were the groceries taken out of the share?

A. After that division is made, then it is taken out [153] of the individual's earnings.

(Testimony of Fenton K. Gerstle)

Q. The amounts expended for groceries are divided into the number of shares that the men get?

A. That is right. For a 12-man crew it is 12 shares for the groceries.

Q. On the theory that the men eat the groceries and the boat doesn't?

A. That is right.

Q. Who pays for the maintenance and upkeep of the boat?

A. The Van Camp Sea Food Company as owners.

Q. Is any portion of that expense borne by the fishermen?

A. No, sir.

Q. On either the Gloria R or the Bessemer?

A. No, sir.

Q. Who pays the social security tax?

A. Well, the Van Camp Sea Food Company. It is deducted from the crew, from the individual, but we make the return.

Q. Do you pay the employer's share of the social security?

A. The company does; yes, sir.

Q. Do you retain the withholding tax?

A. From the crew? [154] Q. Yes.

A. Yes, sir, until such time as we make our returns.

Q. And do you transmit the withholding tax as employer of the fishermen?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Mr. Gerstle, I show you a tabulation that you made prior to the last time you testified in this case—

Mr. Lande: I will stipulate that that can go into evidence.

Mr. Toner: Very well.

(Testimony of Fenton K. Gerstle)

The Court: That will be Exhibit B.

Mr. Toner: As representing the amounts of money earned on board the Bessemer for October 1944, November 1944 and December 1944 respectively.

The Court: That will be one exhibit.

Mr. Toner: Very well.

Mr. Lande: So stipulated.

The Court: It is in evidence.

(The documents referred to was received in evidence and marked Respondent's Exhibit B.)

Mr. Toner: That is all.

Mr. Lande: No questions.

(Witness excused.) [155]

The Court: Next witness.

Mr. Toner: The respondent rests.

Mr. Lande: May I recall Nicola Curci for cross-examination?

The Court: Yes.

NICOLA CURCI,

recalled as a witness by and in behalf of the respondent, having been previously duly sworn, was examined and testified as follows:

Mr. Lande: To save time, would you stipulate that the direct examination of Mr. Curci given on the previous trial may be read into the record?

Mr. Toner: What pages?

Mr. Lande: Pages 101 to 107.

Mr. Toner: I believe it will expedite matters if we stipulate that the Court may read those pages without

(Testimony of Nicola Curci)

the necessity of them being read into the record, with the same effect as if they were read into the record. It is just a matter of mechanics of the thing. If Mr. Lande prefers to have the entire examination read into the record, he may do so, but I don't see any necessity for reading eight pages at this time.

Mr. Lande: The reporter states it may be copied in later if necessary. In the meanwhile the Court can read it through very quickly. [156]

The Court: In other words, you offer this in evidence as part of the cross-examination of this witness?

Mr. Lande: Yes, your Honor

The Court: It is admitted in evidence, and in the event of an appeal it may be copied into the record. This will be Libelant's Exhibit No. 4.

(The testimony above referred to is, in words and figures, as follows, to wit:)

NICOLA CURCI,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nicola Curci.

Direct Examination

By Mr. Toner:

Q. Where do you live? A. Eighth Street.

Q. What is the address? A. 545.

Q. San Pedro? A. Yes.

Q. Were you on the Gloria R at the time of the collision on October 4, 1944? A. Yes. [157]

(Testimony of Nicola Curci)

Q. And where on the boat were you?

A. On the boat what?

Q. Where were you on the Gloria R?

A. Alongside Biago on the pilothouse.

Q. When you started toward San Pedro what course did you follow?

A. The moon came up early and the skipper says, "Not enough fish." He says, "We better go home," and he is going north by little bit west just to San Pedro.

Q. Did you see the lights of any other ship?

A. I see the green light about three-quarters of a mile out off of the Gloria.

Q. Ahead of the Gloria or to one side?

A. The other boat I see the green light—that is, the Bessemer.

Q. Was that ahead of the Gloria R?

A. Bessemer ahead of the Gloria R.

Q. You saw it about three-quarters of a mile away?

A. Yes.

Q. What direction was it going?

A. The Gloria R?

Q. The Bessemer.

A. He is going little bit, I think, east.

The Court: East?

Mr. Toner: Yes, a little bit east. [158]

Q. And the two ships—as the two fish boats approached what happened then?

A. What happened then? We going right to San Pedro and the Bessemer he come in—

Q. The Bessemer came into the Gloria, is that what you said?

The Interpreter: That is what he said.

(Testimony of Nicola Curci)

By Mr. Toner:

Q. The Bessemer came into the Gloria R?

A. Yes.

Q. And hit the Gloria R?

A. Hit the Gloria R.

Q. And was the Bessemer making a turn?

A. No, going straight.

Q. The Bessemer was going straight? A. Yes.

Q. And went into the Gloria R? A. Yes.

Q. Was the Bessemer on the fish?

A. Yes, he is on the fish.

Q. And was he making a turn on top of the fish?

A. He make one turn, see, on top of the fish. He make one turn on top of the fish. Maybe find no more fish and he started to run again.

Q. Now, what direction was the Bessemer headed in when [159] it collided with the Gloria R?

A. I don't understand what you mean.

Q. When the collision happened what direction was the Bessemer headed in, when the two boats came together?

A. Right through the kitchen and the mast.

The Court: The question was, what direction was the Bessemer traveling. And according to the witnesses here they are almost in accord on that. They said the Bessemer was headed in a westerly direction.

By Mr. Toner:

Q. Was the Bessemer headed west at the time of the collision? A. Yes.

Q. Now, did the Bessemer have any mast light on?

A. No.

(Testimony of Nicola Curci)

Q. What lights were on the Bessemer?

A. Just the green light.

Q. The running lights?

A. Yes, running lights—that is all.

Q. Green light on the starboard and red light on the port?

A. Yes.

The Court: I do not understand the significance of the red and green lights as well as you people; but assuming the Bessemer was headed in a westerly direction and the Gloria R [160] in a northwesterly direction, that is, going toward Catalina Island, which light would be visible from the south?

Mr. Toner: Which light of the Bessemer, your Honor?

The Court: Yes.

Mr. Lande: The left light or red light.

The Court: You are talking in a language that is rather difficult for me to follow.

Now, according to each of these diagrams the Bessemer was headed toward Catalina Island?

Mr. Lande: Yes, sir.

The Court: And the Gloria R was approaching her going in a northwesterly direction?

Mr. Toner: Yes.

The Court: Now, as they approached which side of the Bessemer would have the red light?

Mr. Lande: The left side or south side.

Mr. Toner: Red light on the left side and green light on the other side.

Q. Now, as the Bessemer was ahead of the Gloria R, if the Bessemer was ahead of the Gloria R, and in this position, if the Court please, the green light would

(Testimony of Nicola Curci)

be visible on this side and the red light would become visible only when she turned into that position.

The Court: I understand that part of it.

Mr. Toner: There is a catch phrase that identifies the [161] lights by this means—it says “red-left-port.”

The Court: I understand that but I cannot keep it in mind. But you may proceed.

By Mr. Toner:

Q. You are familiar with the San Pedro custom with reference to a masthead light?

A. San Pedro custom—masthead light? Well, when you are not on the fish—

Q. Just answer whether you are familiar or not. Do you know the custom? A. Yes, sir.

Q. What does the custom mean?

A. The custom—you have a red light on top of the mast. It means danger, you see, you better look out, you better go away.

Q. And when do you put on the masthead light?

A. Well, sometime you—when you are on top of the fish. Sometimes you may be on top of the fish and you run the boat about a half hour sometimes with it on.

Q. Was there any red light on the Bessemer?

A. No.

Mr. Toner: That is all.

The Court: Just a moment. Did you see a red light at any time on the Bessemer?

The Witness: No, sir. [162]

The Court: That is all. All you ever saw on the Bessemer was the green light?

The Witness: That is all.

(Testimony of Nicola Curci)

Cross-Examination

By Mr. Lande:

Q. Isn't it true it is also part of the custom just to put the red light on just as you lower the net?

A. That is the law. The law is you have got to have a red light on top of the mast.

Q. When the net is being lowered?

A. (No answer.)

The Court: Any further questions?

Mr. Lande: I am trying to think, your Honor, whether I have anything further.

Q. After you made your big turn around here and you came back to the Island and started out toward San Pedro, were you going home, is that right?

A. Yes.

Q. You were not circling for fish then, were you?

A. No.

Q. And you did see the Bessemer circle for fish, didn't you? A. Yes, sir.

Q. What?

A. I see one time stop. I don't know find fish or not. [163]

Q. You could have just as well steered you boat a quarter or a half a mile from where the Bessemer was, couldn't you? A. About three-quarters of a mile.

Q. And from that three-quarters of a mile you went up to where the Bessemer was, didn't you?

A. Went right through to San Pedro.

Q. And you went about eight knots an hour.

A. About seven or eight knots an hour.

Mr. Lande: That is all.

The Court: That is all.

The Court: Very well. I have finished it. Any further rebuttal?

Mr. Lande: No, your Honor. The libelant rests.

The Court: The libelant rests.

Mr. Toner: The respondent rests.

The Court: How must time will you want for argument?

Mr. Lande: I will waive opening argument.

The Court: On the question of the evidence here, I think the evidence shows that the fault lay in the Gloria R.

Mr. Toner: If the Court please, we have several situations in a case in admiralty, as the Court well knows. First of all, the Court can find the sole fault on one vessel, sole fault on the other vessel, or mutual fault. [164]

The Court: I think the custom here was either to put the light on when they were circling the fish or when they started to or to put it, as the witness says, "It is the law." I don't think he meant that there is any statute on it but when they dropped the net they had to have the light on. That is the custom.

Mr. Toner: That violation was on the part of the Bessemer.

The Court: I do not think there was any violation. They hadn't dropped their net.

Mr. Toner: I see.

The Court: And as far as the custom of circling, there is not direct testimony that they should have circled one way instead of the other. In fact, the law of common sense and reason would indicate that they might circle one way or the other according to the judgment of the

mastman as to which would be the best way to circle fish or find out where the fish were and which way they were going. So I do not think there is any violation on the part of the Bessemer as to the encircling movements. In other words, from listening to the testimony and the witnesses and considering all of the factors that go into the matter of weighing testimony, I am satisfied that the Gloria R was at fault and the Bessemer was not at fault.

Mr. Toner: I have this to suggest to the Court, and [165] that is that the testimony of the master of the Bessemer indicates that he did not blow the whistle, he did not do anything until the vessels were practically on each other, and that nothing was done. Now the law is that two vessels cannot get into that close proximity without there being fault on both parties.

The Court: Without there being fault? What if they did not know about it? What if they did not know that the ship is going to hit? His testimony was that he saw the vessel approaching and he went about his business, which he had a right to do, assuming that the Gloria R would avoid him, and the next thing he knew the Gloria R was where he couldn't be avoided, it wouldn't have done any good to blow the whistle.

Mr. Toner: We had the obligation, under the International Rules, to maintain our course in speed when we see the vessel. If we see the green light we are negligent if we do not maintain our course at that speed. There are any number of decisions on that point. As a matter of fact, the statute so holds. International Rule, I think it is 27 or 19 perhaps, requires us to hold course and speed. We had to hold course and speed. when we see a vessel going east and we are going north.

The Court: That is taking the testimony of your witnesses as true, that they saw the green light. But the testimony of the other side is that it was red to red. [166]

Mr. Toner: Yes, that is correct.

The Court: So it is impossible to believe both sides.

Mr. Toner: I appreciate that.

The Court: And it becomes a matter of judgment. And it is without any discredit to anybody particularly that I, as a judge, believe the libelant's witnesses and I believe from the testimony that the Gloria R was at fault.

Now as to your case of *Loe v. Goldstein*, I do not think that that is applicable in this instance.

Mr. Toner: That is applicable solely on the question of whether *Gennaro Di Leva* was a charterer or an employee.

The Court: That is out of the case. He is an employee. That question is out of the case, and the question is whether or not, under your theory of the case, these people cannot sue their employer.

Mr. Toner: That is correct. The case of *The Lydia* is the leading case on the subject.

The Court: *United States v. Laflin*?

Mr. Toner: *United States v. Laflin*.

The Court: I have read that.

Mr. Toner: The Ninth Circuit there said, at page 685:

"It is well settled by the decisions that in whaling voyages—"

And that is the same as here.

The Court: The same lay and share basis as this. [167]

Mr. Toner: The same lay and share basis as this.

“—the sailors who have a certain lay or share in the proceeds as wages are never regarded as partners with the owners, though they may participate in the profits of the voyage; and it is equally well settled that neither the officers nor members of the crew may join with the owners in a recovery of the proceeds of the voyage.”

Now in support of that proposition the Ninth Circuit has cited *Lewis v. Chadbourne*, *Grozier v. Atwood*, *Baxter vs. Rodman*, and has quoted very liberally from *Taber v. Jenny*. Those are old cases, it is true, but I think they are rejuvenated by the use by the Ninth Circuit in 1929 in *The Lydia* case.

The Court: The difficulty with this case and your theory is that the Ninth Circuit Court of Appeals did not entirely close the door on this kind of a suit in this case, because they say, at page 865:

“We find no difficulty in sustaining the trial court’s conclusion that the owner could bring the action as representing the crew, and that within the meaning of the statute the latter might ‘submit their claims’ through him, and might sue him for damages, if he neglected to prosecute the same.” [168]

Mr. Toner: That is correct.

The Court: And again quoting from *Taber v. Jenny* they adopt the doctrine:

“If the owners neglect to take proper means to obtain indemnity, they would be responsible to seamen for that neglect.”

Now your theory, if I understand it correctly, is that Van Camp Sea Food Company being the owner of both

of these boats, and being the employer of both of them, cannot sue itself.

Mr. Toner: That is correct.

The Court: And cannot be forced to sue itself.

Mr. Toner: That is correct.

The Court: I do not think that in admiralty, where equity principles are applied, that it was ever intended that the owner—an owner being an owner of two vessels and damaging a vessel such as this and resulting in injury and loss to the crewmen—that the equitable principles would foreclose entirely those crewmen from collecting whatever damages they have. I think this case is authority for that proposition because it says “if he neglected to prosecute the same.” If they “neglect to take proper means to obtain indemnity, they would be responsible to seamen for that neglect.”

The evidence here shows that they have not done anything. Of course they haven’t sued themselves but they have [169] paid the seamen either.

Mr. Toner: I do not think they have an obligation to sue themselves.

The Court: I do not think they have an obligation to sue themselves either—I think that would be a little ridiculous—but I cannot go along with your theory.

Mr. Toner: If the Court please, here we have a profit-sharing agreement in lieu of wages.

The Court: But they are employees.

Mr. Toner: They are employees, that is true. If I have an employee and I say to this employee, I will give you 10 per cent of my profits, or half of my profits, and I don’t have any profits, he doesn’t have to share in the losses. Now when Van Camp has a fishing boat col-

lision between two fishing boats there are no profits. They have operated those two fishing boats at a loss.

The Court: I still go back to the proposition that admiralty applies the principles of equity.

Mr. Toner: Yes, that is correct.

The Court: Equity is a court of conscience and a court of conscience certainly would not just because one owner happened to own two vessels preclude these people from recovering. If the Gloria R had been owned by the United States or Joe Doakes or John Brown or anybody else there would not be any doubt about their right to recover because, due to the [170] fault of the Gloria R, they have been prevented from earning, that is to say, catching and sharing in the lay of that ship which they would have otherwise done had there been no fault on the part of the Gloria R.

Mr. Toner: I appreciate the Court's attitude, but I don't necessarily agree with it.

The Court: There is no unusual distinction in not agreeing with me. I may be entirely wrong, but that is the way I see it. Therefore the question remains as to what is the measure of damages here. I have not calculated your figures that I have observed on the other exhibits. Is there any difference between your exhibits here and the figures in this letter from the Fish and Game Commission?

Mr. Toner: I don't think they are the same thing at all, if the Court please.

The Court: This shows the daily deliveries of the Bessemer for October, November and December 1944. And here are the earnings in money, is that right?

Mr. Toner: Yes. By the individual fishermen.

The Court: By the individual fishermen?

Mr. Toner: Yes.

The Court: There is no doubt but what the shares of the lay are agreed on here, I mean, that it was $18\frac{3}{4}$ and each man got one, and the master got one and a fraction, whatever it is, so it is not necessary for me to make these calculations on the share of the lay. And it is also admitted that the price of sardines was \$22 a ton.

Mr. Toner: It was so stipulated.

The Court: So it seems to me the measure of damages here would be the number of tons of sardines that would have been caught during this period, multiplied by \$22, and then divided into the separate shares.

Now how would you arrive at that number of tons? I have taken some figures here and worked back and forth on them. In other words, taking October and November as average months, from October 14th until the end of November was a total of 45 days. Now while they did not fish every day, there is a total number of 45 days and a total quantity of fish of 1,047,450, plus 896,850, and 45 days into that total quantity of fish would have been an average, or was an average, of 43,206 pounds of fish caught each day. That is not a fishing day, that is a day.

Mr. Toner: That is 43,206?

The Court: Let me see here. (Making calculation) Yes. Say 43,200 pounds of fish a day during those months. Assume that during the eight days that the ship was laid up—

Mr. Lande: Nine days, your Honor.

The Court: The 3rd to the 13th?

Mr. Lande: From the 4th to the 13th inclusive.

Mr. Toner: Isn't there a Sunday in there? [172]

The Court: I have counted Sundays in this calculation.

Mr. Toner: Boats don't fish on Sunday.

The Court: I know, but what I have taken is every day from the 14th of October until the 30th of November, inclusive, and the total fish caught in that period, and instead of trying to say they fished this day and that day I just took the total number of days and average pounds of fish caught per day, and that gives a figure of 43,206.

Mr. Toner: The libelant, on page 4 of his libel, is asking for eight days.

Mr. Lande: That was eight actual days, but inasmuch as the Court is making this calculation, there is no question but what the boat was laid up from the night of the 4th to the 13th.

The Court: If you reduce this to just fishing days, counsel, if there are eight fishing days your average would be almost 50 per cent more. It would calculate on that basis then 81,000 pounds of fish.

Mr. Toner: That I don't follow. If you have four Sundays that they didn't fish—

The Court: They fished the 14th, 16th, 17th, 18th, 19th, 21st, and they skipped days in there up until the 28th.

Mr. Toner: Those are days in which they fish but they missed. Those should count to reduce the average. If this boat goes out on Wednesday night, October 21st, and doesn't [173] catch any fish, that should count.

The Court: They went out October 21st and caught 186,000 pounds of fish.

Mr. Toner: I am using that as an example. There are nights that they go out and don't catch any fish.

The Court: That is exactly what I have done here.

Mr. Toner: Fishing days are every day except Sunday, so that out of those 45 days there are six Sundays.

The Court: The way I have done is taken every day whether they went out and caught anything on those nights or whether it was Sunday. In other words, it seems to me that that would be the fairest way to take an average when you cannot tell whether they could have fished. So that gives a figure of 43,206 pounds of fish, and if there are nine days—

Mr. Lande: Your Honor, there were ten inclusive from the 4th to the 13th.

The Court: That is what I thought, that it was 10 days.

So taking 432,000 pounds of fish, divided by 2000 pounds per ton, that would make 216 tons, is that right?

Mr. Lande: 216 tons.

Mr. Toner: 216 tons.

The Court: Yes, 216 tons of fish, and at \$22 a ton as the admitted price, that would make \$4752. Then you would divide that by $18\frac{3}{4}$. [174]

Mr. Toner: I think the operating expenses come out of that first.

The Court: Yes. That is gross. Is there evidence here of what the average operating expense is?

Mr. Toner: There is evidence in there as to the operating expenses over that length of time.

The Court: What does it average?

Mr. Toner: I don't know. I haven't seen it.

The Court: I will let you fellows figure that out.

Mr. Toner: Before the Court gives a judgment, may I suggest that the Court look at the earnings of each man for the balance of the month of October? It is found that they lost eight days, eight fishing days, during October, and they fished 13 days during October. They made about \$500 and some odd dollars for the 13 days that they fished in October and this way they are going to get a good deal more than \$500.

The Court: Not a great deal more. I think this is the fairest way to fix the gross of all of the catch which has to be fixed before anything else.

In other words, my judgment will be that the gross value of the catch as damages will be \$4752, or 10 days at an average of 43,200 of fish a day, or a total of 216 tons at \$22 a ton.

Now as to the operating expenses, can you agree on that, counsel? [175]

Mr. Lande: Is Mr. Gerstle here yet?

Mr. Toner: He just left.

The Court: I think you probably can agree on that, don't you think?

Mr. Toner: Possibly.

Mr. Lande: Just a minute. Mr. Di Leva informs me that the last 15 days of the month they made the operating expenses that were on the boat while it was laid up. In other words, they still had to buy food, and so forth, on the boat.

Is that right?

Mr. Di Leva: No. The food we bought prior to the accident, and the oil and everything we paid for when

we made settlement at the end of the month and went fishing those 13 days.

The Court: That does not enter into it then. In other words, your operating expense has already been taken out of this. In other words, the average operating expenses per day from October 14th until November 30th inclusive, if you take your operating expenses for that total time and divide it by 45, so much per day, multiply that by 10 and deduct it from \$4752.

On these operating expenses, can you agree as to that? You are familiar with it. Then there will have to be deducted the withholding tax.

Mr. Lande: On a damage accident I submit that that is [176] not so.

Mr. Toner: The Ninth Circuit has said differently.

The Court: That is what I thought, but I believe I was reversed.

Mr. Toner: The Court may get some consolation out of the fact that we have a case in the Supreme Court, the Johnson case, in which that point will be discussed by the Supreme Court and the Court will ultimately be vindicated.

The Court: In other words, it is the law of the Circuit now, as I understand it, that the owner of the boat, in this instance the Van Camp Sea Food Company, deducts the withholding tax and the social security tax in a damage case. This is in lieu of wages. So that will have to be figured out. Do you think you can agree with counsel on that?

Mr. Toner: That is merely a matter of mathematics.

The Court: So that the \$4752 will be reduced by the operating expenses, which will be arrived at by taking the

total operating expenses for the 45 days from October 14th to November 30th inclusive, dividing it by 45 and multiplying it by the 10 days during which the boat was laid up, and subtracting that figure from \$4752, which will give the net figure to be divided by $18\frac{3}{4}$, as the uncontradicted testimony shows $2\frac{1}{2}$ shares for the net, 12 shares for all of the men except the master, $\frac{1}{2}$ share for the master, and $2\frac{3}{4}$ shares for the boat, which will reduce the amount to be paid [177] by Van Camp Sea Food Company.

Is that clear?

Mr. Toner: Yes, your Honor.

The Court: Is that clear to you?

Mr. Lande: Yes, your Honor.

At this late date could I suggest another formula on this? I can't understand how it works out as small as it does if the Court's figures are right on it because I figure practically the same way and I get a result much higher.

The Court: My additions may have been wrong, but I was listening to the testimony and in between bits of testimony adding a column of figures.

Let us start over again. The total for October, according to this letter from the Fish and Game Commission, Exhibit B—

Mr. Toner: I think there is another much simpler method which I don't like to use, but it will simplify all this addition and subtraction.

You have on the exhibits that the Clerk now has the net moneys that these men made during the balance of October and the balance of November. They made \$500 in one month and about \$700 in the other month. You can divide that by 45.

Mr. Lande: These computations have already been made.

The Court: Why not give a judgment for the net figure? Then you do not have to make your calculations. [178]

Mr. Lande: That is right.

The Court: You will have to make your calculations anyhow because you have to make your return.

Mr. Lande: At least it will give us the amount of the judgment and then we will turn it over to Van Camp and they can figure out the different things.

The Court: I think it would be better to figure it on the other basis, of \$22 a ton.

We will start out with October, with a total of 896,850, November 1,047,450. Are you satisfied that those figures are correct? I have not totaled them.

Mr. Lande: They are correct, sir.

The Court: And it is 45 days inclusive, is that right?

Mr. Lande: Yes, sir.

The Court: You divide that by 45.

Mr. Toner: What was that figure, 1,000,000 what?

The Court: 1,944,300 pounds.

Mr. Lande: The October delivery was 896,850, November 1,474,450.

The Court: I have a figure of 1,047,450.

Mr. Lande: I must be in error.

The Court: I will check it again.

I still get 43,206, which is the figure I had before.

Mr. Toner: That is what I get.

Mr. Lande: Here is what we were thrown off on. There [179] is a dark of the moon in there, which throws you off for seven days.

The Court: That does not make any difference.

Mr. Lande: But the days they lost were fishing days, and you are averaging in some dark of the moon days when they were in for a solid week.

The Court: Out of 45 days you have a dark of the moon, do you not?

Mr. Lande: Yes, sir.

The Court: And you have a light of the moon?

Mr. Lande: Yes, sir.

The Court: Let us get a moon calendar. Who has a moon calendar for 1944?

The latter part of October was the light of the moon and the early part of November was the dark of the moon, good fishing days; then the light of the moon, and then the good fishing days started again.

Mr. Lande: From what it shows here, it shows from the 28th of October to the 8th of November it was the light of the moon and no fishing, a total of 10 days.

Mr. Toner: That is not correct. The light of the moon is two days either side of the full moon.

Mr. Di Leva: Three days.

The Court: Just a moment now.

We will carry this average on through December, down to [180] December 14th, and that will be 45 days plus—well, it ought to be December 15th—that will be 60 days. So we will divide it by 60 and that will get as

many lights and darks of the moon as you would otherwise. The moon is every 28 days, is it not?

Mr. Toner: Every $29\frac{1}{4}$ days, to be exact.

I can make this suggestion to the Court: The Court can rid of this entire computation by referring it to a referee.

The Court: We can do it now in 20 minutes and it will take a referee two weeks.

Mr. Lande: Your Honor, may I interrupt and suggest something?

On the first sheet it shows, that is, the first sheet of the Fish and Game Commission's letter, that for the days October 4th to October 13th—

The Court: I cannot take what 89 boats show and take the average of the boats. It has to be based according to the Bessemer's capacity because I have no idea, and there is no evidence here, as to what the capacity of the other boats was.

I am taking the figure up to and inclusive of the 13th of December. That will give you exactly 60 days.

Mr. Lande: That hits us with two full moon periods, and that will drop the average out of proportion.

The Court: That is just three days short of two full [181] cycles.

Mr. Lande: On the 45 days we only get caught with one full moon so we are better off at the 45 days. I understand the Court wants to try to get the most equitable way you can in working it out here. But may I suggest this alternative: You have in October, November and December three darks, that is, when the vessel fished. Now you have the record of what they did on two complete darks, November and December. For October you have a record of what they did on half a dark. Can't we work out something from what the darks are there?

The Court: I think probably this is as good a way as any. I have added this other in and it still averages up, instead of 43,206 it is 42,080 something, so I think the first 45 days average is as good as any.

Mr. Toner: I have been making some computations here, if the Court please, and I find that in the balance of October one share was worth \$502, in all of the November one share was worth \$606.

The Court: That is net or gross?

Mr. Toner: That is one share to the men. That is money that goes to the men.

The Court: That is after the deductions?

Mr. Toner: That is after all operating deductions.

The Court: How can Van Camp Sea Food, the respondent in this case, calculate their withholding tax and their un- [182] employment tax if I say that their net is so much money, that is, after the deductions are paid?

Mr. Toner: That is before deducting the withholding tax.

Mr. Di Leva: That is after the pay. That is with the withholding tax, social security and all expenses out. That is pay.

The Court: I think this average figure, gentlemen, is about as equitable as you will find because I have taken the 60 days and it comes to 42,000 pounds of fish a day, and you add in a few more days and it brings it up to 42,500, and the 45 days gives you 43,206 pounds of fish per day.

Leveling off the odd figure and multiplying by 10 that would be 432,000 pounds of fish, and dividing that by tons would be 216 tons, and at \$22 a ton that would be \$4752. That is the figure that we talked about a while

ago. I think that is about as fair and equitable a way of calculating the gross amount of the lay as possible.

Now if you can agree on these other figures, all right. If not, I will have to settle them now.

Did you say you had an average expense there, total expense?

Mr. Toner: I am attempting to look for it. I don't see the fuel bills.

The Court: I do not see why you cannot figure the ex- [183] penses on the same basis that I figured this other, the total expense for the periods remaining in October and November, and multiply it by 10 and deducting the other figure.

Mr. Toner: The Court ran them until the end of November.

The Court: Forty-five days beginning October 14th until and inclusive of November 30th.

Mr. Lande: Of course we come right down to getting an average. The Court wants to know what an average would be if the vessel had gone out. I submit that of the 45-day period you should consider the days when she would have gone out. In other words, she actually only would have gone out during those 45 days at the very most 40 of those days, so therefore the catch that she would have gotten would not have been the figure for the 45 days. Your divisor is not 45, but 40.

The Court: That is all true, counsel, but the difficulty here is that you have not any exact measurement of damages anyhow. I cannot say, nor can anybody say, that if they had gone out that night and had not been damaged they would have caught 200 tons of fish or 10 tons of fish or no fish, as they did on some other nights. So it is just a matter of using judgment on what is the

fairest average. It seems to me that if I take too short a time it might be unfair to either side. If I take the average time it seems [184] to me to be the fairest way to do it.

Mr. Lande: That would be true, your Honor, but we are being hurt here, I submit, in that in the divisor that you are using you are using a number that includes some full moon day when we couldn't fish.

The Court: The moon was coming up this night at 9:00 o'clock.

Mr. Lande: But it was within the fishing period. You see, from 7:00 o'clock on they still could fish.

The Court: They could fish all night in the dark.

Mr. Lande: In this particular case they couldn't.

The Court: As a matter of fact, the other boat was going home because the moon was shining.

No, I think this is about as fair and equitable a way as I can figure out. If you gentlemen can figure out the expenses, that will be fine; if you cannot then I will have to examine the exhibits and make a judgment on it.

Mr. Toner: I was at the point of reading some of these expenses.

The Court: I think you gentlemen can figure that out. You can sit down together and make those calculations. I have given you the basis to calculate it on and the gross value of the catch. You can figure that out and submit the judgment.

Court is adjourned.

(Whereupon, at 4:40 o'clock p.m., court was adjourned.)

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith. Clerk. [185]

[LIBELANT'S EXHIBIT NO. 4]

In the District Court of the United States for the Southern District of California, Central Division.

Honorable Ben Harrison, Judge Presiding

Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, and Peitro Colombo, Libelants, vs. Van Camp Sea Food Company, Inc., a corporation, Respondent. No. 4630-BH-Adm.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Thursday, May 16, 1946.

Appearances:

For the Libelants: Herbert R. Lande, Esq.

For the Respondent: McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black, Esq., and George E. Toner, Esq.

Los Angeles, California, Thursday, May 16, 1946

10:00 A. M.

The Court: Are you ready to proceed, gentlemen?

Mr. Lande: The plaintiff is ready.

Mr. Toner: The defendant is ready.

The Court: Gentlemen, are you in position to stipulate to any of the facts?

Mr. Lande: The defendant has kindly consented to stipulate that if an official of the Department of Fish and Game of the State of California were called that he

would testify as set forth in this letter and attachment; and this letter is as follows:

“To Whom It May Concern:

“The official records of the California Division of Fish and Game show that 66,389,680 pounds of sardines were delivered in the Los Angeles area between October 4th and October 13th, 1944, both dates inclusive.”

That is the date that the Bessemer lost fishing time.

Now, in order to get some comparisons we also requested the following information—the total deliveries in the Los Angeles area by months. They were for October, and then it gives the number of boats and the poundage of October, November and December. And then it says that the same boat, the Bessemer, delivered poundage during October, November and [3] December as follows, and states that poundage. And then it gives the daily deliveries of the Bessemer during October, November and December.

The Court: As I understand, gentlemen, that is stipulated to.

Mr. Toner: Yes, it is stipulated if the Chief of the Fish and Game Commission were called he would so testify.

The Court: In accordance with this letter and its attachments?

Mr. Toner: Yes. And I think it should be further stipulated that the sardines brought \$22.00 a ton at the time and that both of these vessels were owned by the Van Camp Company.

The Court: Sea Food Company.

Mr. Toner: Sea Food Company. And that this accident occurred on the evening of October 4, 1944, and caused physical damage which resulted in the lay-up of the Bessemer from that date to October 13th.

Those are the facts that would undoubtedly come out and they are stipulated to.

The Court: It is stipulated that the accident occurred at a certain time?

Mr. Toner: Yes, approximately 9:15 p.m. on October 4, 1944.

The Court: And the vessel was restored to service when? [4]

Mr. Toner: She went out again on the 14th of October, 1944.

Mr. Lande: That is correct. And during that period there were eight fishing days lost. May we have this marked for identification?

The Court: It will be received in evidence as Libelants' Exhibit 1.

(The document referred to was marked as Libelants' Exhibit No. 1, and was received into evidence.)

Mr. Lande: I think we can also stipulate, Mr. Toner, may we not, that the Bessemer was on charter to Salvatore DiLeva and that Anthony DiLeva was the master pursuant to that charter.

Mr. Toner: Yes.

Mr. Lande: And it was what was known as a "bare boat charter"—that is a charter that chartered the boat to the DiLevas and they were to victual, man, and supply and operate the vessel, and that pursuant to that charter—

The Court: The Bessemer was?

Mr. Lande: Yes. And pursuant to that charter the Van Camp Company was to get a certain number of shares for the use of the vessel and that the crew itself were to be paid by shares—that appears from admissions in the pleadings.

Mr. Toner: It isn't truly a "bare boat charter," if the [5] court please. It is a part of the agreement for operation.

The Court: Can't the agreement be introduced in evidence by stipulation?

Mr. Lande: I have the agreement here. Mr. Toner can see it. It was entered into in 1941, your Honor, and there was never any subsequent agreement entered into. They just went ahead on the assumption that that was in force and they operated the boat under just the oral understanding, more or less, from then on out. But this is the first and only charter party agreement that was entered into in writing between the parties.

Mr. Toner: I wouldn't want to stipulate to that particular charter because I haven't seen it as yet. I would rather reserve any stipulation on that score until I have a chance to look over the charter.

Mr. Lande: You can look at it during the recess and that will come into play only after liability has been established.

Mr. Toner: The important issue is as to the shares agreement upon which this boat and this crew were operating and I think that should come out by testimony.

The Court: All right, proceed.

Mr. Lande: Your Honor, your Honor probably noted from the answer to the libel, the second amended libel, the

allegations of Paragraphs 1, 2 and 3, and that they are admitted, so I won't go into the preliminary matters. [6]

The Court: There is no reason why you should go into matters that are admitted.

Mr. Toner: Before we start the testimony I should like to respectfully bring to the court's attention the fact that we are not going into the merits of the case but that in no way waives the allegations of our answer that no cause of action has been stated.

The Court: I assume your preliminary motions in that respect protect your record.

Mr. Toner: I just wanted to be sure of that, if the court please, and I think that we should go into the question of the legal effect of this shares agreement.

Mr. Lande: Take the stand, Mr. DiLeva.

ANTHONY DiLEVA,

called as a witness by and on behalf of Libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Anthony DiLeva.

Direct Examination

By Mr. Lande:

Q. Mr. DiLeva, where do you live?

A. 1231 8th Street, San Pedro.

Q. What is your occupation?

A. Fisherman.

Q. How long have you been fishing? [7]

A. Oh, approximately nine years.

Q. On October 4, 1944, were you on the Bessemer?

A. I was.

(Testimony of Anthony DiLeva)

Q. In what capacity? A. I was on the mast.

Q. Were you the captain of the boat?

A. I was.

Q. Now, will you tell the—strike that. On October 4th whereabouts was the vessel?

A. At Catalina.

Q. At about nine o'clock?

A. Around Catalina Island.

Q. What fishing season was in progress?

A. Sardine season.

Q. And what type of boat were you operating?

A. The boat Bessemer.

Q. Is that a purse seiner?

A. Purse seiner. It has two different names. It has two different types of nets.

Q. But it is a purse seiner?

A. It is a purse seiner type, yes.

The Court: What was the size of the vessel?

The Witness: 73 feet.

Q. By Mr. Lande: What was the tonnage?

A. Tonnage was 51, I am pretty sure, 49 or 51. I am [8] not positive.

Q. Now, how large a crew did you have on board?

A. 14 men.

Q. That is including yourself?

A. Including myself, yes.

The Court: You were the master of the boat?

The Witness: Yes, sir.

Q. By Mr. Lande: Now, about nine o'clock whereabouts were you stationed?

A. I was stationed on the mast looking for fish.

Q. Now, will you explain to the court—

(Testimony of Anthony DiLeva)

Mr. Lande: Is the Court familiar with that or do you want to go into the details of that?

The Court: Yes, you are going to have to go into detail because I am not familiar with it.

The Witness: If you are not familiar with the fishing activities, usually a man, they call him the "mast man," he is in the crow's nest—that is in the pole. He is the man that looks for the fish. Then you have the man at the wheel and you have one at the controls.

Q. By Mr. Lande: Control of what?

A. The engine. He is the fellow—you tell him to go ahead a little faster or slower or reverse.

Q. Can you control your engines from the wheel house?

A. You can. They have controls upstairs. In fact, [9] they have got them in the pilot house and upstairs too.

Q. Now, the crow's nest is at the very top?

A. That is the pole.

The Court: I know what you mean.

The Witness: It is on top and you look out. You have a longer vision, I guess.

Q. My Mr. Lande: Now, who was at the wheel?

A. My father, Salvatore DiLeva.

Q. Who was at the engine controls?

A. My brother, Mike DiLeva.

Q. Where were the rest of the crew stationed?

A. All at their stations. In fact we were ready to lower the net.

Q. You say they were all at their stations. Now, tell the Judge what the different stations were.

(Testimony of Anthony DiLeva)

A. There is one on the bow—the bow man, because you see, Judge, you are not familiar with fishing activities. I say when you look for fish, when there is no moon, you look at the water first. That is how you tell. That is how you see the fish by the fire in the water. When the moon is up there is no more phosphorus in the water and for sardines they usually jump. They call them “flipping.” That is how you tell where the biggest bunch is and the flipping the most, that is where you usually haul the net. That is where you usually get the most and that is where we were. The moon was [10] up and we were listening for these flippers. We had two men in the skiff.

Q. Where was the skiff? A. On the stern.

Q. Attached to your vessel?

A. Attached to the vessel and the net attached to the little skiff.

Q. One end of the net?

A. One end of the net was in the skiff.

Q. And the other?

A. Was on the boat. Well, you go around—you have two men in the skiff with one end in the skiff and then you make your circle around the fish and then the other end, you go and pick up the skiff and you start pulling both ends.

Q. About nine o'clock that night or 9:15 did you come to a school of fish?

A. Oh, yes, we were on the school of fish.

Q. You were on a school of fish?

A. We were on a school of fish, yes.

(Testimony of Anthony DiLeva)

Q. All right. Now, tell us what happened?

A. Well, we was on the fish and you know, as I say, you know when the moon was out and these fish were starting to jump, well, when the fish start to jump you have to listen for them. You have usually one man in the bow and everybody—sometimes a couple of men and you listen for the bigger part [11] of the fish. Well, you have the men in the skiff ready to lower the net when you do hear the biggest part, so we were just circling around. We made a circle around the fish like this, and to the left, and then we stopped and this Gloria R made a complete circle far from us, not close, complete circle around us and went toward the east end of the Island again.

Well, we was looking to the Island and we happened to hear the fish more to the left so we made to get on right. We made a circle to the right and we were circling to the right.

Q. About how fast were you going?

A. Oh, just the propeller. Maybe one mile an hour. That is all. Not more than that. And as we were making the circle this Gloria R came from the east end and was coming out from the east end. Well, we noticed we were completing the circle and we kept one course to the island and we showed red and red light.

Q. Now, explain to the Judge what you mean by that.

A. Well, when you got a red and red light that is showing the port bow, port side of the ship—their port and our port. That is red lights. Starboard has a green light.

Well, when they are coming this way and they are showing their red light—in fact you have to go in oppo-

(Testimony of Anthony DiLeva)

site directions to show their red light and our red. You have to be traveling in opposite directions to show that, the same lights. [12]

Q. Do your courses have to be approximately parallel?

A. Approximately, yes. Not all the time, no. Don't have to be parallel. Could be going out this way (demonstrating) and you go this way (indicating) but still you see it—still you see just the red light. But in this case we were going parallel and then we were just heading with the propeller. We were going for the Island and he come out and all of a sudden the Gloria R started to turn and I seen—I started to see the red and green and I hollered at my father, "Watch out, he might make a turn in front of our bow." And it was going to be bad for us. All of a sudden I see him start. He did turn and I see his green—his green light, that is the starboard. He was cutting across our bow so I figured we were going slow enough that if we threw the propeller out of gear and threw the engine in reverse that we would clear him, but the Gloria R kept its course and I hollered and he never slacked his speed to try to avoid the accident.

Q. How many knots an hour was he going, do you think?

A. I figured around eight knots. That is about the speed. And he never did slack his speed. Well, your Honor, if he would have kept going on his course and us reversing full speed he would have cleared us, but I don't know if he got excited or what it is. He turned hard to port. Well, we were this way—brought me toward the Island this way and [13] he cut across like this (demonstrating) and as we were going astern, you know the

(Testimony of Anthony DiLeva)

stern of the vessel, any vessel when you go full speed astern, it has a tendency to go one way or the other. It never backs straight. Well, the Bessemer was—we were reversing and we were in reverse motion. The vessel was going a little to the port and that would bring our bow like this (indicating), and he was going straight, and if he would have kept the same course, the same course, we would have cleared him. We would have cleared him. We would have cleared his mid-ships, but he turned full speed, full speed to the port and that—there is his stern at us and as his stern hit us it pushed our bow out.

The Court: Did you give him any signals?

The Witness: Well, to tell the truth, we didn't have no chance. The only thing I figured we would have a chance to clear him, so we were going so slow—we threw our engine in reverse but just about when we were going to hit he sounded the whistle but that was too late—a few seconds before, but I figured if we—

The Court: Did he give you any signal?

The Witness: No signal at all. He didn't even try to avoid the accident. I hollered when he started to turn. I hollered and he never slacked his engine down or nothing. The only thing he did was turn hard to port and that was the worst thing he could do because that causes his stern or his [14] midship to push our bow out. You see, if he had kept going straight on his course that he was on he would have cleared us. He would have just cleared, barely cleared us.

Q. By Mr. Lande: At the moment of impact what was the direction of your vessel? Forward or astern?

A. Going slight astern because we were going slight ahead and then we had to throw the propeller out and

(Testimony of Anthony DiLeva)

throw the engine in reverse, full speed reverse and that takes a little time.

Q. Was his vessel visible to you?

A. At all times it was visible.

Q. I mean, it was a clear night?

A. Oh, clear—clear as a night could be. It was like daytime. The moon was out. It was just like daytime.

Q. Now, Tony, will you step to the board here and on this sheet of paper—this is north and south and west and east. Will you draw in Catalina Island and show the courses of the two different vessels, using the blue crayon for the course of the Bessemer and the red crayon for the course of the Gloria R.

A. I will say this is Catalina. That is not a very good island.

Q. We understand this.

A. This is the east end. This is Avalon. We were fishing right here (indicating). We had the skiff in the [15] stern here. The first time we seen the Gloria R he made a complete circle around us.

The Court: Let me ask you this: The first time you saw the Gloria R how far were you apart?

The Witness: Oh, about a mile and a half, I would say. We were the only two boats over there fishing. Then we happened to be alone that night and he made a complete circle around us. He went around us like that (indicating). While he was doing that we were listening to the fish here and we made a complete circle like this and we were laying like that again listening for the fish.

(Testimony of Anthony DiLeva)

Q. By Mr. Lande: Then you were both going in the same direction at that time?

A. We were, but when he made this circle he was way over here. He went to the east end of the Island again and then after we started circling—you see, these boats when they see one boat is on fish like that, when they are flippers, they usually all close in together and they have a tendency always to go close to one another and so we made the circle over here. We heard the fish more here. We figured they were traveling towards the east end, so we made a righthand turn like this and then we was headed for the Island and he heads out again like this. He was showing his red light, the port light, and we were showing our port light.

Q. Now, just a minute, Tony. May I take this pencil [16] and mark that position No. 2 where they are port to port.

The Witness: I made the drawing a little too close. All of a sudden he turns, turned hard port and this is about the position I seen him when he was this way here. From the mast I could see his red and green.

Mr. Lande: May I make that Position No. 3?

The Witness: That is the time I started to holler. I don't know if he heard me or not.

The Court: How far were you apart at that time?

The Witness: Oh, I would say about a quarter of a mile—no, not that much. About $\frac{1}{8}$ th of a mile, I guess, and then after—oh, not even that much. What am I talking about? No; I guess it was about 200 feet.

The Court: 200 feet?

The Witness: Yes.

(Testimony of Anthony DiLeva)

Q. By Mr. Lande: Do you see the length of this courtroom? Would you say it was twice as far or three times as far as the length of this courtroom?

A. About three times as much.

Q. Approximately 300 feet?

A. Approximately 300 feet.

The Court: This courtroom is not 100 feet in length.

Q. By Mr. Lande: In other words, you think now—it is your best recollection now that it was about 300 feet away from you at that time? [17]

A. About that, yes.

Q. At that time you say you saw both red and green lights?

A. Yes. I hollered and that is when I told my father to go full speed reverse. Well, I figured that we were going so slow with the propeller that the boat will back up easy. We had the forward motion and to throw in reverse it takes some little time, but so little time that we would clear him and he just cut right across our bow this way in completing his turn and we were going full speed reverse and that threw the stern of the Bessemer this way, a little toward port, and then just when he got about to our bow he turned full speed—I mean hard over but he completed his turn and he smashed—

Q. Turned which way?

A. To the port, throwing his stern at our bow and that is where his—he was about three or four feet, I guess, aft of midships. That is where it smashed—pushed our bow there.

Q. Now, you draw the position of the boats at the time of the impact. Draw them in a little heavier.

A. It was over a little this way.

(Testimony of Anthony DiLeva)

Mr. Lande: May I label the position of the Bessemer then as No. 4 at the time of the impact?

The Court: As I understand the diagram, the red crayon represents the Gloria R.

The Witness: Yes. [18]

The Court: And according to the drawing, as I view it, the Bessemer hit—

The Witness: No, the Bessemer didn't hit the Gloria R. Her bow was there, but she was going in an astern motion and when he turned, if he would have kept his course this way he would have cleared the bow.

Respondent DiLeva: We would have sunk the vessel.

The Court: Did you hit him or did he hit you?

The Witness: He hit us. They have got pictures to show that our bow was pushed to starboard. If we would hit him straight the bow would have been smashed. It wasn't smashed. It was pushed.

Q. By Mr. Lande: Regardless of that, Mr. DiLeva, you actually saw the collision from the mast?

A. Yes, I seen everything.

Q. Now, at the time of the collision your vessel was going slightly astern?

A. Astern, yes. As I say, any vessel as soon as it is going full speed astern it has a tendency to go one way or another—either to port or starboard. No vessel, very seldom, do you see a fishing boat that will back straight up.

The Court: Did you have your nets out at that time?

The Witness: No. We had the two people in the skiff. Everybody was at their station ready to lower the net and as we went full speed reverse the stern turned a little to port. [19] That throws the bow a little to star-

(Testimony of Anthony DiLeva)

board and that is how he hit us. It was about three or four feet aft midship. That is what hit our bow. The Bessemer did not hit him.

Q. By Mr. Lande: In other words, is it right that as the Gloria R swung hard left the stern of her just sort of kicked around and smashed you in the bow?

A. Smashed in the bow, yes.

Mr. Toner: Just a minute, if the court please. I do not mind questions being somewhat leading, but I don't think that counsel should actually get to a point where he is testifying. That is why I make an objection to the question, and the answer, as leading.

The Court: It is nothing more than repetition of what the witness testified to.

Mr. Toner: I do want to get to the bottom of it and I haven't made any objection to leading questions but I think that question is very leading.

The Court: The objection is overruled. This witness seems to have the picture well in mind. The question asked by counsel was no different from what the witness has testified to. It was simply repetition in order to clarify the picture in the mind of the court, assuming that I have not understood the witness, which I have.

Q. By Mr. Lande: Now Mr. DiLeva, from the time you saw her red light off your port bow—that is when you were [20] red to red. A. Yes.

Q. Did you alter your course? A. No.

Q. Now, from any time after that—that is, after the time you were red to red, did you alter your course?

A. No. The only time I would alter my course a little was when we were in reverse and the boat would turn. As I say, it has a tendency to go one way or

(Testimony of Anthony DiLeva)

the other. That is the only time. But we were going in an astern motion.

Q. At the time of the impact, what, in your opinion, was the speed of the Gloria R?

A. About eight knots.

Mr. Lande: If your Honor please, is it agreeable to the court—I would like to have these witnesses testify first as to their liability so the continuity will be in the court's mind and not go into the shares agreement until after we have put in that part of the case. You may cross-examine. But before you cross-examine, may I introduce the diagram as the Libelants' Exhibit next in order?

The Court: Yes.

(The diagram referred to was marked as Libelants' Exhibit No. 2, and was received into evidence.) [21]

Cross-Examination

By Mr. Toner:

Q. Mr. DiLeva, your father was at the wheel, is that right? A. Yes, sir.

Q. He is not in the courtroom today?

A. No, he isn't.

Q. And as I understand it, you said that you made a complete circle around the fish? A. Yes, I did.

Q. Now, which way were you circling? Were you circling in a starboard turn or port turn?

A. On a port turn the first time.

Q. First time? A. Yes.

Q. And then you made a complete circle?

A. Yes.

Q. And at that time the Gloria R was far off of you, you said? A. Yes.

(Testimony of Anthony DiLeva)

Q. About how far off?

A. About a mile and a half.

Q. A mile and a half away?

A. Yes, around that.

Q. And which way was the Gloria R headed at that [22] time?

A. Well, it was, as I said, he made the circle around us. He was in no particular course. He was just turning.

Q. That is the large circle?

A. That is the large circle around.

Q. And then he went down toward Avalon?

A. Toward the east end. That is where we were, off Avalon.

Q. He went down toward the east end of the Island?

A. Yes.

Q. And how long prior to the collision was that?

A. Oh, not very long, because he just turned when he got to the east end. We made the other circle to the right and then he turned out showing his red and our red and then after he made—he just turned his wheel and cut across our bow.

Q. Well, how long a time elapsed between the time the Gloria R was at the point I am marking "A" to the time she got to the east end of the Island?

A. I don't know. He was going eight miles an hour. You can figure that out yourself. I don't know.

Q. I want you to figure it out.

A. I don't know. I don't keep time on them.

The Court: You don't know?

The Witness: No. [23]

The Court: Was it an hour?

(Testimony of Anthony DiLeva)

The Witness: Oh, no. I can't say right to the minute. Approximately, about 10 or 15 minutes.

Q. By Mr. Toner: And what distance—what was the distance between A-1 and A-2?

A. Oh, about a mile and a half.

Q. Now, I am going to put in "1½ miles" here from A-1 to A-2.

The Court: When did you first feel there was going to be a collision?

The Witness: When I seen his port and starboard light both. That is a sign he is turning—he is starting to cut. That is when I started to holler. He didn't—he never—the fellows at the controls they just had time to throw the wheel out and throw it in full speed reverse, trying to prevent the accident, and then after I hollered and he never slowed the engine down or nothing. He just kept going, making his turn and that is when he hit us.

Q. By Mr. Toner: Now, in your complaint, or in your libel, Mr. DiLeva, you state on page 2 that "at said time the vessel was moving ahead slowly to lower the net, headed toward the east end of the Island with the Island approximately dead ahead."

A. That is right.

Q. That is correct? [24]

A. That is right.

Q. Now, where on your diagram is that?

A. Right here.

Mr. Lande: It says: "The Bessemer thereupon circled to the right in a clock-wise direction."

The Witness: That is right.

(Testimony of Anthony DiLeva)

Q. By Mr. Toner: That is your first circle.

A. No, that is the second. This is the first to the left. That was the first.

Q. The left circle was the first circle? A. Yes.

Q. Then you made a right-hand circle, is that right.

A. Yes, sir.

Q. So that the second circle your rudder was—

A. To the starboard.

Q. And you were proceeding to starboard, making a starboard circle? A. That is right.

Q. And then at Position 1, what light did you see on the Gloria R?

A. Position 1? Port light.

Q. You saw the port light or red light?

A. The red light.

Q. That is the port light? A. Port light. [25]

Q. At Position 1. And what was the bearing of the Gloria R to the Bessemer at that time?

A. Oh, it was about southwest, I guess.

Q. Well, was it off your port bow?

A. Yes, port bow. Off our port bow, yes.

Q. That is Position 1? A. Position 1.

Q. You saw red.

Mr. Lande: There is no Position 1 on the map.

The Witness: Here is where we were. You didn't mark this position. This is Position 1. Here is where our port bow is and that is where his port bow is.

Q. By Mr. Toner: I am marking this as Position "No. 1." And which is the bow of the Bessemer at Position 1?

A. Towards the Island.

Q. This is the bow of the Bessemer at Position 1?

A. Yes.

(Testimony of Anthony DiLeva)

Q. And this is the stern? A. Yes, sir.

Q. And at that time you saw the Gloria R's red light?

A. Yes.

Q. Off your port bow?

A. To tell you the truth, the first time we seen him, we seen his red light but he was way off. We didn't pay no [26] attention to him because we were on the fish.

Q. What I am getting at is when you were at Position 1 where was the Gloria R? A. Down here.

Q. Where with reference to your boat? Off the port bow? A. Port bow, yes.

Mr. Lande: May I indicate on the map—

The Witness: That is Position 1 of the Gloria R.

The Court: Yes.

Q. By Mr. Toner: Now, at Position 2 what light of the Gloria R did you see?

A. Still her port light.

Q. You saw her red light?

A. Yes, off our starboard bow after they come around at this position here. That is when we seen still their port light and our starboard, but you see, this is us in Position 1. We made this turn.

Q. This No. 1 is you at Position 1? A. Yes.

Q. And here is the Gloria R at Position 1?

A. Yes.

Q. And then they went around you? A. Yes.

Q. And then at Position 2 you saw the Gloria R's red [27] light. A. Yes.

Q. And that was off your— A. Port bow.

Q. Now, how far off was the Gloria R at that time?

A. At Position 2?

Q. Yes. A. I say about 300 feet.

(Testimony of Anthony DiLeva)

Q. And then the Gloria R you say made a turn?

A. To port.

Q. To port? A. Yes.

Q. And at that time you saw the red and the green lights?

A. And green as he was turning. That is just when he was starting to turn, you see, at this position here.

The Court: I understand what he means by that.

The Witness: When you are starting to turn, here is his port. Here is his red light. Here is the port light. It is the red. The starboard is green. That is when he was starting to turn. You can see both lights then, but after he completes the turn you just see his green light. You don't see his port light any more.

Q. By Mr. Toner: At Position 2 you were in a starboard circle around the fish, weren't you? [28]

A. At Position 2? Yes.

Q. You were making a starboard circle?

A. Yes.

Q. And had you intended to complete that starboard circle?

A. We did. We did complete it. We were heading in the same course for the Island listening for the fish coming this way.

Q. This is the starboard circle you are talking about here? A. That is right.

Q. The blue line that is marked A-2, that is part of your starboard circle?

A. Yes, that is the circle.

Q. Then you left your skiff up in the—

A. No, we didn't leave the skiff. The skiff was always in the stern. We did not lower the net.

(Testimony of Anthony DiLeva)

Q. The skiff was attached to the vessel?

A. Yes.

Q. To the Bessemer? A. Yes.

Q. And the idea of making a circle around the fish is to complete the circle?

A. Well, it is the idea of—you are talking about the skiff now? [29]

Q. What maneuver were you going through? What operation were you performing?

A. Listening for the biggest body of the fish, the flipping.

Q. You were on the school of fish.

A. We were on the fish.

Q. You intended to circle that school of fish.

A. Yes, sir.

Q. And that is why you were making the starboard circle?

A. Yes, to get on the most part of the fish.

Q. And you usually complete the circle, don't you?

A. Yes.

Q. So you intended to continue that starboard circle until you had completed it?

A. That is right.

Q. So had the accident not happened you would have— A. Wound up in the same position.

Q. Wound up about where you started your circle?

A. That is right.

Q. So that when you made the statement that you did not alter your course, you mean that you did not intend to change that starboard circle? A. No.

Q. You were in a starboard circle and you had left [30] your rudder set hard to starboard?

(Testimony of Anthony DiLeva)

A. That is right. We made the circle. Here is the circle we made. Then when we get to the fish we stop, usually stop. We were just about ready to stop anyway to listen to the fish again, to see if we were on the biggest part of the fish and that is when he cut across our bow.

Q. But you had not stopped?

A. We were going with the propeller. The circle was made but we were going straight for the Island.

Q. At that particular time you were going straight for the Island? A. Yes, sir.

Q. But if the Gloria R had not been there you would have continued?

A. No, we would have kept going straight for the Island. The circle was made.

The Court: How were you going to get your nets out?

The Witness: That is how it is. You see, your Honor, when we were at this position we had the fellows in the skiff. We made the circle from the fish to the left. Well, we were just at the position to lower the net. That is why we had the men ready as we find the fish. Then we are right ready to lower the net and we then just lower it when we find the biggest body of fish. That is the position we were in.

Q. By Mr. Toner: How large a school of fish was it? [31]

A. It was a big school. There was enough for both of us.

Q. How much of an area did it cover?

A. Oh, it covered, I would say, a good mile all around.

Q. All around? A. Yes.

(Testimony of Anthony DiLeva)

Q. How close to the edge of the school do you come with your boat?

A. You never know that because you don't see the fish when there is a moon up. You don't see them. You just hear them flip.

Q. You are watching pretty close?

A. You have to hear them and where the biggest body is that is where you lower the net. Usually, sometimes you get a load and sometimes you don't. It is more of a guess.

Q. If you are lucky you get a load?

A. If you are lucky you get a load? It depends on the fish. A lot of times they are flipping lots and you don't get nothing and sometimes there are only a few flippers and you load up.

Q. When you are making these circles you have to be pretty alert, don't you, so the fish don't get away?

A. That is right.

Q. And you are up in the crow's nest for the very [32] purpose of seeing that the fish don't get away?

A. That is right.

Q. Now, what lights did you have on the Bessemer?

A. The running lights is all.

Q. That is red and— A. Red and green.

Q. Did you have any light on the mast?

A. No light on the mast.

Q. You had no red light on the mast? A. No.

Q. No white light on the mast? A. No.

Q. Did you have two white lights on the mast?

A. None.

Q. Are you familiar with the fishermen's custom in San Pedro? A. I am.

(Testimony of Anthony DiLeva)

Q. That when a boat is on fish they are supposed to have a red light in the mast?

A. It is not when they are on the fish; it is when they are lowering the net to put the red light to show they are lowering the net. That is the custom.

Q. In any event, you had no light on?

A. No light on the mast, no.

Q. What lights did the Gloria R have on? [33]

A. Running lights, the same thing.

Q. Running lights? A. Yes.

Q. Red port light and green starboard light?

A. Red port and green starboard, yes.

Q. Now, as you were making this circle to the starboard the bearing of the Bessemer to the Gloria R, or vice versa, the bearing of the Gloria R to the Bessemer would constantly change, would it not?

A. What do you mean? When he made the circle?

Q. Well, as you were making the circle, when you are headed in an easterly direction— A. Yes.

Q. You would see the Gloria R over your starboard side or stern? A. That is right.

Q. And then as you come around you would see the Gloria R dead ahead, wouldn't you?

A. No; because they weren't in this position when they were turning. They were on this, about right over here then. They did not come straight out until we completed the circle.

Q. Indicating "over here" is indicated by the letter B. When the Gloria R was at "B" you would probably see her over your starboard?

A. Yes, we would be coming here and they would be on [34] our starboard, yes.

(Testimony of Anthony DiLeva)

Q. Then as the Gloria R continued on from "B" to "C" and you continued on from A-2 to say B-2, the bearing of the Gloria R would change, wouldn't it?

A. Still see their red light.

Q. You would see them first over your starboard bow and then as you came around you would see them over your port bow, wouldn't you? A. That is right.

Q. In this position at B-2 was there ever a time when you saw both lights of the Gloria R? A. No.

Q. You saw only their red light? A. Red light.

Q. And the only time that you saw—

The Court: I understood he said he saw both lights.

Mr. Toner: I am coming to that.

Q. When he is up here then the only time that you saw both lights was after you reached the position marked No. 2 here? A. Yes.

Q. And you state that the Gloria R made a port turn?

A. That is right.

Q. So as to turn her bow directly toward you?

A. That is right. [35]

Q. Was it dark at the time.

A. No; it was clear as day.

Q. Visibility was good?

A. Very good. The moon was out. It was like day-time.

Q. And you say that you blew no whistle?

A. We did just before we were ready to collide, about two or three seconds.

Q. You blew a whistle about two or three seconds before you collided? A. Yes.

Q. Now, were you giving the orders?

A. I was.

(Testimony of Anthony DiLeva)

Q. From the crow's nest? A. I was.

Q. You were what is called the "Fish Captain," is that it? A. Yes, I was.

Q. You gave the orders to the pilot house?

A. Yes.

Q. And the pilot house operates the controls?

A. Yes.

Q. And you had two men in the pilot house; one was your father?

A. Three. We had Mr. Carnevale. He was up there too.

Q. In the pilot house? [36] A. Yes.

Q. He was not at the controls?

A. No; he was just watching the fish.

Q. Who was at your bow?

A. There was a fellow who couldn't come up today.

Q. What is his name? A. Chigi Romolio.

Mr. Toner: I think that is all.

The Court: Just a moment. In maneuvering that night were you following the usual and ordinary custom of sardine fishermen at San Pedro?

The Witness: Yes, sir.

The Court: In circling a school of fish?

The Witness: It is a little irregular, the right-hand turn in fishing, because usually it is always to your left, but this right-hand turn was, as I say, to get—you don't see the fish. You just hear them. You just hear where the biggest body is.

The Court: You simply circle around the school of fish?

The Witness: Yes.

(Testimony of Anthony DiLeva)

The Court: Was the practice that you were following the usual practice?

The Witness: Yes, it is.

The Court: And the Gloria R was also following the usual practice? [37]

The Witness: Well, your Honor, that—as I say, the boats get together like when the moon comes up and the fish start flipping. When they see a boat turn a couple of times that means they are usually on fish and they always have a tendency of coming close because the flippers are always in one area, close to one another, and they have a tendency to come close to the boats, because there is usually more than enough for one.

The Court: There was nothing unusual then about the Gloria R circling around?

The Witness: No, nothing unusual.

The Court: He was not maneuvering contrary to custom?

The Witness: No.

The Court: What was wrong then with his maneuvering?

The Witness: Because he cut across our bow. That was the only wrong thing he did.

The Court: In other words, he should have continued on his course?

The Witness: He should have when he saw it was red and red—that is, he should have crossed our stern again. He should have kept going—he should have continued showing the red light and passed our stern and then he could have went any other way he wanted, unless there was another boat in back and at that time there just happened to be us two boats.

(Testimony of Anthony DiLeva)

The Court: It was not an occasion where each boat was [38] fighting for the same fish?

The Witness: No. As I say, there is a tendency when there are fish flipping like that to try to get close together and usually after one lowers a net the other lowers it right next to us.

The Court: In other words, the boats work together?

The Witness: No, they don't work together. The fish work together.

The Court: There was no question of intrusion on fish that you had located?

The Witness: No. Just that he probably seen us with the men in the skiff and circling on the fish and he thought we were ready to lower the net and he would come right next to us and start looking for his. That is all.

The Court: Then you feel that his error was in making too sharp a turn and cut into your bow?

The Witness: Yes.

The Court: And when you realized that you put your engine in reverse and was trying to avoid the accident?

The Witness: Yes.

The Court: And according to your testimony you were pulling away a little bit?

The Witness: Yes.

The Court: Any additional questions?

Mr. Toner: I have one more question, if the court please. [39]

(Testimony of Anthony DiLeva)

Q. By Mr. Toner: You stated that the net was partly in the boat and partly in the skiff?

A. Yes. You have what you call the line. You have a little line at the end of the net and then when you lower the net then you go and pick up the skiff again and they throw that line onto the boat and then you start pulling both ends.

You have got rings on the bottom of the net that you close the net with and that traps the fish and then you start pulling the net in.

Q. How much of the net was in the skiff?

A. Oh, none—just the rope—just the rope for the skiff men to throw onto the boat. No net goes in the skiff.

Q. Was any of your net in the water?

A. None.

Q. Any of the rope? A. None.

Q. In the water? A. None.

Q. But part of the line from the net was in the skiff? A. In the skiff, yes.

Q. You said further that the Bessemer and Gloria R collided and that the collision was between the stem of the Bessemer and the stern?

A. Not the stern. I said three or four feet aft of midship. [40]

Q. Three or four feet aft of midship?

A. Two or three feet.

Q. Two or three feet?

The Court: I understand you have photographs of the Bessemer taken after the collision?

Mr. Toner: I don't have any pictures.

The Witness: The insurance company took pictures.

(Testimony of Anthony DiLeva)

Mr. Toner: I don't have any, but I think it is established the accident happened about midships on the Gloria R.

Q. Is that correct? A. That is correct.

Mr. Toner: That is all.

(Witness excused.)

Mr. Lande: Salvatore Carnevale.

SALVATORE CARNEVALE,

called as a witness by and on behalf of the Libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Salvatore Carnevale.

The Court: I do not know that this is altogether regular. We have one version of the accident.

Mr. Lande: Everything I put on from now on is corroborative. [41]

The Court: Why not hold the corroboration and use it for rebuttal and determine what the differences are between the parties?

Mr. Toner: That is an excellent idea, if the court please, and we are now permitted to put on our witnesses out of order.

The Court: What I mean is, the court has one picture as to the contention of the libelant in this case and I want to see where the differences are—where the conflict comes in.

Mr. Toner: There will be certain items where the stories will be the same and certain items where there is definite conflict.

The Court: And I want to determine what the conflicts **are**.

Mr. Toner: Incidentally, if the court please, there are two Anthony DiLevas in this case—the one who just testified, the master of the Bessemer, and the Anthony DiLeva that was the master of the Gloria R.

The Court: What is the relationship?

Mr. Toner: Cousins.

The Court: Well, we will call one “Anthony” and the other “Tony.”

Mr. Toner: I was going to suggest that we call one “Tony Bessemer DiLeva” and the other “Tony Gloria R Di Leva” [42]

Will you take the stand?

ANTHONY GLORIA R. DiLEVA,

called as a witness by and on behalf of the Respondent,
testified as follows:

The Clerk: State your full name.

The Witness: Anthony DiLeva.

Direct Examination

By Mr. Toner:

Q. Please state your address.

A. 660 9th Street, San Pedro, California.

Q. You were the master of the Gloria R on October 4th, 1944?

A. That is right.

(Testimony of Anthony Gloria R. DiLeva)

Q. That was not your regular boat?

A. No. Our regular boat was broken down. We were just chartering this boat for the time until our boat was ready to go fishing again.

Q. And the boat was owned by—

A. Van Camps.

Q. Now, on the night of October 4, 1944, your boat and the Bessemer were in collision, were they not?

A. That is right.

Q. And whereabouts did this collision occur?

A. Well, right out of Avalon Bay.

Q. About how far off the Island? [43]

The Court: Did the former witness describe its location approximately?

The Witness: That is about the right position, about four miles from the Island—three or four miles.

Q. By Mr. Toner: Now, will you describe the lights that you had on the Gloria R?

A. We had just our running lights, starboard and port lights.

Q. Red light for the port side and green light for the starboard side?

A. That is right.

Q. And those lights are set in screens, are they not?

A. Yes, sir.

Q. So that the red light cannot be seen off the starboard bow and the green light cannot be seen off the port bow?

A. That is right.

Q. And the screens are so constructed they cannot be—the light cannot be seen more than two points abaft the beam?

A. That is right.

(Testimony of Anthony Gloria R. DiLeva)

Q. Now, where were you at the time of the collision?

A. Up in the crow's nest.

The Court: You were looking for fish, too, were you?

The Witness: Yes, sir. [44]

The Court: You were also called the "Fish Captain"?

The Witness: That is right.

Q. By Mr. Toner: Who was at the bow?

A. At the bow of our boat, he is not here at present.

Q. And who was at the wheel?

A. Biagio Como.

Q. And who else was on the house with Biagio Como?

A. Nicola Kerchi.

Q. Were there several others in the house, too?

A. Just one other and he is not here.

Q. Now, what were you doing at the time?

A. We were looking for fish, too, but the moon was already out an hour or so.

Q. And what did you decide to do?

A. After we ran around a while and didn't find any, we decided to go on home.

Q. By "home" you mean to San Pedro?

A. That is right.

Q. And where were you at the time you decided to go home?

A. As soon as we circled inside the Bay and we didn't find anything we put our bow straight out for San Pedro. That was north and a little bit west.

Q. And you intended to return to San Pedro?

The Court: Did you say there was no moon out at that [45] time?

The Witness: The moon was out over an hour.

(Testimony of Anthony Gloria R. DiLeva)

Q. By Mr. Toner: When you set your course for San Pedro about what course was it?

A. North, a little west. In that position there where we were at.

Q. I am going to ask you to draw—

Mr. Toner: Can the Court see down at this part of the blackboard?

The Court: If he uses the blackboard you have no record. Why don't you have him draw it in the other half of the paper, Libelants' Exhibit 2?

Mr. Toner: I thought we would use the blackboard because we can make a larger diagram and then copy it.

The Court: You may use the blackboard as far as the court is concerned.

Mr. Lande: We have two sheets of paper there. Let him use one.

The Court: I want the first one to remain so I may see the difference.

Mr. Toner: I am going to mark this one "Libelants" and this one "Respondent."

Q. Now, let us put the Island here. This is the end of the Island. Now, will you come down here, Tony, and draw in your boat about that large, and indicate where you were [46] when you started your course to San Pedro?

A. Well, we came out here from the east end of the bank, out here, so we head over to Catalina looking for fish.

The Court: Did you get fairly close to the Island?

(Testimony of Anthony Gloria R. DiLeva)

The Witness: Well, we came out here. The Bessemer claims he was circling around fish about here, a circle like that.

The Court: What is that circle?

The Witness: He said he circled around the fish.

Mr. Toner: I think we had better use the red crayon for the Gloria R and the blue crayon for the Bessemer.

A. We come out here close to the Island, towards the east end there and did not find anything, so we headed out. We kept on a course straight out to San Pedro here and we headed for San Pedro. This would be the Gloria R like that. Well, he was circling around the fish here and he was looking more to the east—his bow towards the east. We could only see his green light at all times. That is all we seen was a green light and the only light he could see of ours was our green light on this side because our red one would be over here. He claims he was circling on fish. When we are circling on fish the regulation, the way we do it, we put a light on warning the boats, a red light, and he had no red light on, so we kept on traveling straight out this way towards San Pedro and he says that later on he turned to his [47] starboard.

The Court: I don't care what he said; tell us what happened.

The Witness: All right. So we kept going. We got out to about this here position, out here, and he kept running a little ways, circling on the fish. As soon as we got over here we seen this boat. He said he turned to the starboard. He turned to the starboard. We kept going a little ways. He says he threw it in reverse. We

(Testimony of Anthony Gloria R. DiLeva)

kept our same course without changing. The only time we changed our course was when the accident could not be avoided. We turned to the port. If he had turned port, too, it would have avoided the accident because us turning to port we would go that way and his turning to port he would go this way.

Q. By Mr. Toner: Now, when was that turn to the port? Before the collision? A. That was too close.

Q. How many seconds? Was it seconds or minutes?

A. Seconds—a matter of a minute. A matter of a minute you can get away from a boat.

Q. How many seconds? A. Three or four.

The Court: But you saw the Bessemer at all times?

The Witness: Yes, sir. We seen the Bessemer all the time. [48]

Q. By Mr. Toner: How large a circle was he making here around the fish?

A. Well, the average circle. When you set around fish that is about the size there.

Q. How big is that?

A. Oh, about 240 fathoms.

Q. That is how many feet? A. (No answer.)

Q. About 1,440 feet?

A. While he was circling on the fish then he said he turned hard starboard—starboard would be leading to his right and that way he led right into us and he hit us right amidship.

The Court: He hit you?

The Witness: Well, naturally, we can't hit him, your Honor.

The Court: You claim he hit you?

(Testimony of Anthony Gloria R. DiLeva)

The Witness: Well, we can't hit him, your Honor, pardon me, because he hit us with the bow. If we hit him our bow would have been smashed in and not our midship. We are not going to glide into a ship. The Gloria R was hit amidship.

The Court: The Gloria R was hit amidships?

The Witness: That is right.

The Court: And was the Bessemer hit in the midship-

The Witness: The Bessemer was hit in the bow. [49]

Q. By Mr. Toner: The damage to the Bessemer was in the bow?

A. The forward part of the boat. In other words, collided right here amidship.

Q. Now, Tony, if the Bessemer had continued making its circle of the fish and had not made this starboard turn just as you were passing would you have cleared the Bessemer?

A. We would have cleared his stern and kept on our course right out. The Bessemer was laying like that and we would have cleared the stern.

Q. Had you any reason for making a turn to port as the previous witness described?

A. The only reason we had to turn to port was we tried to avoid the accident by turning to the port. We turned to port and since he was always circling to the port, if he would have turned to the port both boats would have not had collided.

Q. The only turning you did—

A. Was to the port.

Q. Three seconds before the collision?

A. Yes, and that was too late then.

(Testimony of Anthony Gloria R. DiLeva)

Q. What was the purpose of that turn?

A. To try to avoid the accident by turning to port.

Q. The last-minute effort to avoid the accident, is that right? [50]

A. Yes, sir.

The Court: You were sailing pretty close to him, weren't you? In view of the fact that he was circling for fish?

The Witness: We always run close to each other.

The Court: But you were headed for home?

The Witness: That is right.

The Court: You were not fishing?

The Witness: I was still in the mast. We had our bow toward home. I did not say we were heading home. I said we had our bow headed towards San Pedro. You always turn to your port and not to the starboard. He claims after turning one to the port he turned once more to the starboard and when he turned to the starboard he turned on us. That is where the accident occurred. And anyway, we didn't know what the boat was doing. All we seen was his green light and no red light warning us that he is going to set because before you set you put on a red light warning the boat you are on the fish and to stay away from him because he is laying his net out and not after the net is in the water.

We had no warning that he was going to turn to the starboard.

The Court: And your vessel was hit amidships?

The Witness: Yes, sir.

The Court: And was it crushed in? [51]

The Witness: Just the guard rail. There was no damage.

(Testimony of Anthony Gloria R. DiLeva)

The Court: And the Bessemer?

The Witness: His bow was torn off.

The Court: Torn off?

The Witness: Yes. When he hit it was solid and his bow smashed in. That is why he had to stay up because the boat sprung a leak.

Q. By Mr. Toner: You can sit down again, Tony.

Now, did you have evidence that would indicate that the Bessemer was on fish?

A. No, we didn't have no evidence.

Q. Did you think they were on fish?

A. We always seen his starboard light when we left the east end of the Island heading toward San Pedro there. All we seen was his green light.

Q. What about the San Pedro custom about having masthead lights? When do you put out your masthead light?

A. All the boats and we do, too, just before you lay out on fish, while circling, the boat while on fish puts on a red light and not after you are in a halt, because somebody comes by and will go through your net.

Q. Now, the idea is in fishing you circle the fish to make them congregate into a smaller space?

A. That is right.

Q. And after you have made several circles around the [52] fish then you lay your net around the fish?

A. That is right.

Q. And the San Pedro custom is when you are circling the fish you have to have a masthead light, is that correct?

A. Usually put a red light on warning the boat you are going into a halt. He had no red light and no

(Testimony of Anthony Gloria R. DiLeva)

whistle of warning us that he was on fish. We are not supposed to know what he is doing there.

Q. Now, had he not—

The Court: You knew he was not out there for his health, didn't you?

The Witness: He was out fishing when the moon was out.

Q. By Mr. Toner: Had he not made this right-hand turn into the starboard beam of the Gloria R, about how far would you have come to the Bessemer?

A. Of clearing him?

Q. Yes, how much distance?

A. About 100 feet or more off his stern, would have cleared his stern.

Q. Now, was he at any time across your course? Did he cross your course here at any time?

A. You mean—

Q. When you saw his green light?

A. That is right.

Q. Did he cross your course? [53]

A. No. Just seen his green light all the time. We never seen his red light.

Q. You never saw his red light?

A. Just the green light.

The Court: You said there were some photographs.

Mr. Lande: We have no pictures, your Honor. All the pictures were taken by the Respondent.

Mr. Toner: The libelants' testimony as to pictures was the first I heard of them. I will make every effort to get them. I am sure if there are pictures I can get them. I haven't had them, though.

Q. You stated that the Gloria R was hit amidships?

A. That is right.

(Testimony of Anthony Gloria R. DiLeva)

Q. Now, how long a boat is the Gloria R?

A. 78 foot.

Q. And amidships would then be 35 feet or 39 feet?

A. That is right.

Q. Was it hit exactly amidships or was it a few feet forward or aft of amidships?

A. Well, it was hit in the forward part—forward of the rigging of the mast. The rigging was hit forward—just about two foot forward of that.

Q. Two foot forward of the mast rigging?

A. Yes.

Q. And what damage was done to the Gloria R? [54]

A. Just smashed a guard rail—smashed in a little—not much damage done to it.

Q. Did you see the damage to the Bessemer?

A. We stood by him after the collision happened.

Q. What was the damage?

The Court: You gentlemen should be able to stipulate as to the nature of the damage to the Bessemer. You both had an opportunity to see the boats, I presume?

Mr. Toner: In a case like this, if the court please, the forward motion of the Gloria R. and the sideward motion and also the forward motion of the Bessemer would cause an inward damage on the Bessemer—

The Court: I understand the damage to the Bessemer was the bow.

Mr. Toner: It was on what is called the stem. That is the piece that comes down and joins up with the keel.

The Court: I wish you would bring into court any photographs of the damage done. I cannot visualize how one ship can be damaged amidship and the other one in the bow and yet the testimony is that the Gloria struck

(Testimony of Anthony Gloria R. DiLeva)

the Bessemer and the Gloria received only a scratched guard rail.

Mr. Lande: If your Honor has noticed how a street-car comes around a track when it makes a curve—the rear end of the street car will sort of not follow a true circle but will sort of skid out and make a wider arc than the tracks under- [55] neath. Much the same thing happens, Mr. DiLeva tells me, when a boat's rudder is put hard to the right or to the left. That is the rear end or the stern of the Gloria R—you see the boat is on a curve there, of course, and as the rudder—you see the thing is controlled by the rudder in back and it is a forward and sideward motion. In other words, the rear end of the Gloria R sort of skidded out past a true circle. The boat has a tendency to turn on a point amidships.

The Court: In asking these questions I am trying to clarify in my own mind as to what happened. For instance, Tony Bessemer in this case states the Gloria R collided with his boat and I understand Tony Gloria says that the Bessemer hit his boat, isn't that true?

The Witness: That is right.

The Court: Proceed.

Q. By Mr. Toner: At the time of the collision was the Bessemer in motion? Was the Bessemer moving?

A. She was moving.

Q. Which way was she moving?

A. She was moving onto us.

Q. Forward? A. That is right.

Q. Not moving astern or standing still?

A. No. Anyway, when your boat is moving forward, when you have your propeller in she don't stop on a dime

(Testimony of Anthony Gloria R. DiLeva)

when you [56] throw in reverse. She still has the forward tendency—the tendency to go forward a while.

Q. Her engines may have been in reverse but the boat was going forward?

A. It was still going in a forward motion. That is not an automobile to come to a dead stop and put in reverse and back up.

Mr. Toner: I think that is all. You may cross-examine.

Cross-Examination

By Mr. Lande:

Q. Mr. DiLeva, isn't it a fact that according to the International Rules and custom in San Pedro, the red light is only put on when the boat is ready to and is lowering the net to catch the fish?

A. Not necessarily. When you are circling on fish a lot of times you put on the red light.

The Court: What is the custom?

The Witness: The custom is two white lights and no fishing boat uses the two white light custom in San Pedro.

The Court: What is the custom of putting on the red light on the mast?

The Witness: That is to warn the boat.

The Court: When?

The Witness: Before you lay your net out.

The Court: How soon before? [57]

The Witness: Sometimes some boats put it on—stay on fish for a half hour and put it on right after the first—keep the light on for a half hour and keep circling around the fish.

(Testimony of Anthony Gloria R. DiLeva)

The Court: Sometimes they put it on just before they drop the nets, too, do they not?

The Witness: Yes.

The Court: They do it both ways?

The Witness: Yes, that is right.

The Court: The fact there was no red light would not indicate that the Bessemer was not going to drop its net?

The Witness: He claims he was on fish. He seen we were there. Why didn't he warn us that he was on fish so we could stay away from him?

The Court: Why didn't you stay away from him?

The Witness: We did not know he was on fish.

The Court: You saw him there and you saw the boat. You had the entire ocean there.

The Witness: That is right. We were headed straight out north to San Pedro. We would clear him. We weren't going to hit him. We were going to pass the stern of him. He would have been laying like this and we pass on the stern of him going to San Pedro.

Q. By Mr. Lande: You could have just as well gone to San Pedro and passed a couple of hundred yards astern? [58]

A. We happened to be on that course and kept going on it.

Q. And you did not bother to move over to give him a wide berth, then, did you?

A. Well, how do we know he is on fish?

Q. You saw him circling, didn't you?

A. No, we didn't. We just seen his green light.

(Testimony of Anthony Gloria R. DiLeva)

Q. Haven't you got your diagram there indicating that the Bessemer was circling?

A. He claims that is what—he says—he claims he was circling on the fish. I did not say I seen him.

Q. Well, you saw him some time before the collision, didn't you?

A. Yes; we passed—we passed on the outside of him. We seen his green light just like he says here.

The Court: As I understand it, this may says he saw the green light and the other witness said he saw nothing but the red light.

The Witness: We were hit on the starboard side.

Q. By Mr. Lande: But that was after you had turned to port, though, was it not?

A. No, sir, always on the course.

Q. Where was your course headed for? San Pedro?

A. Eventually north, north and west.

Q. Had you given up fishing? [59]

A. I was still in the mast. We were still looking for fish.

Q. Then you were still looking for fish and were not heading for home giving up?

A. You could look for fish from Catalina on home. There was a—we would have to drift four hours if we got there so we could look for fish on the way home, which boats do sometimes.

Q. When was the first time you saw the Bessemer?

A. When we came around him—when we came to the Island like he has his diagram drawn here. Came around from out here and we seen him right over here and we made a turn.

(Testimony of Anthony Gloria R. DiLeva)

Q. All right. Now, let us mark on this diagram where you were making this circle towards the Island. Did you see the Bessemer over—

A. We seen the Bessemer as soon as we approached the Island out here.

Q. Put an "X" where your vessel was when you first saw the Bessemer.

A. When we first seen the Bessemer?

Q. Yes.

A. We come around and circled up this way.

Q. Put it in heavy. Put it in red because red is your boat. A. All right. [60]

Q. Now, while you made this big circle that you have indicated there, you saw the Bessemer all that time, didn't you? A. Yes; and he could see us too.

Q. All right, and you saw that he was circling on fish, didn't you?

A. We were looking for fish. We weren't paying attention to him. We just seen the vision of a boat there. He could see us, too. He just said that you could see a boat way off.

The Court: Don't argue. Just answer the questions.

Q. By Mr. Lande: Is it your testimony, then, that you did not observe the Bessemer as you made that circle?

The Court: His testimony is that he saw the Bessemer.

Q. By Mr. Lande: Did you see him and then glance away and not look at him again?

A. That is right; because we were looking for fish just like he says. When you are on fish you are looking

(Testimony of Anthony Gloria R. DiLeva)

for fish. You are looking to lay your net out. We weren't paying attention to him and we came out there looking for fish.

Q. Well, don't you watch the boats around you?

A. Sure, we seen the boat.

Q. When you are circling?

A. That is right. When we were off from them.

Q. You admit that it is your duty as the mast man to [61] watch for the different boats?

A. Not to watch for boats as mast man. It is the duty to look for fish.

Q. Is that the duty of the wheel man?

A. He is at the wheel to steer the boat. I am looking for fish.

Q. Now, isn't it a fact that it is your duty to turn the wheel or call out to the wheel man when you see a boat? A. No, sir.

Q. In the way there?

A. No, sir. I am in the mast. The man at the wheel can steer the boat the way he wants when he is on the fishing ground. It is not my duty to go to the starboard or port or steer straight ahead. We don't do that on our boats.

Mr. Lande: I have no further questions.

The Court: That is all.

Mr. Lande: Just one more question.

Q. At the time of the impact how fast was the Gloria R going? A. About eight knots.

Mr. Lande: That is all. Shall we proceed now, your Honor?

The Court: Yes.

Mr. Lande: Mr. Carnevale, will you take the stand? [62]

SALVATORE CARNEVALE,

called as a witness by and on behalf of the Libelants, having been previously duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Salvatore Carnevale.

Direct Examination

By Mr. Lande:

Q. You were on the Bessemer the night of this collision, weren't you? A. Yes.

Q. Whereabouts were you on the boat?

A. What?

Q. Whereabouts were you on the boat?

A. I was alongside his father, alongside the wheel.

Q. In the wheel house?

A. Yes; on top of the pilot house.

Q. Now, tell the Judge what happened at the time of the collision. You tell it in your own words, what you saw.

A. Well, the first time, you know, we see this boat, the Gloria R, we see it go east end, and we come right in front of Avalon there. Well, when we go over there and we find the fish and we circle around about three or four times, and the moon come up and we see the fish very good and, well, when we saw the Gloria R we circle over there and then he [63] figure we got fish, because he was over there first—he don't find no fish. After he see us circling around and he come in close, you see. Well, he come in close. It was—a guy said, "Well, maybe he is smart. He wants to take our fish." He come in too close and he was full speed all the time. When we got through circling around we got everything all ready—the people in the skiff and another guy in the bow. When

(Testimony of Salvatore Carnevale)

we was all ready the Gloria R pass us full speed, close to us and never slow down. When he was about half the boat past us he turned the wheel around at once and hit us in the bow and he broke a couple of pieces of board alongside of the front and throw it on one side.

Mr. Lande: May the record show the witness indicates the stem and bow of the vessel as being turned to the right?

The Witness: Yes.

The Court: Did you strike the Gloria R or did the Gloria R strike you?

The Witness: He struck us because he go full speed and we go slow and he tried to get our fish. He come right close.

Q. By Mr. Lande: Right before the boats came together? A. Yes.

Q. How fast was the Bessemer going?

A. Bessemer, he go slow, because he circle around, because we have got to set. We can't go fast and set. If we make it fast we can't set. [64]

The Court: How slow were you going?

The Witness: Oh, maybe a mile or mile and a quarter, something like that. No give it the power.

The Court: Were your nets in the water?

The Witness: No. We have got two guys on the skiff all ready to set.

The Court: How long have you been fishing?

The Witness: Close to, about two years.

The Court: When do they put the red light on the mast?

The Witness: Just when we start to set.

The Court: When you start to set the net?

(Testimony of Salvatore Carnevale)

The Witness: Yes.

The Court: You do not put it on before that?

The Witness: Lot of times they do it before. Sometimes, you know, just do it because other boats pass by and you think they pass on top of the nets and cut the nets.

The Court: I did not understand that.

Mr. Lande: He said a lot of times they put the red light on ahead of time so as to scare the other boats away, so they won't come too close because they are afraid they will cut the nets. They sometimes put the light on ahead of time.

Q. During the time you have been in San Pedro has it been the custom there that you put the red light on when the nets are ready to go in the water and you are starting to lower [65] the net?

A. Yes, when—there are lots of boats too close you put the light on, but if there are only one or two boats you don't put the red light up before—just when we start to set.

Q. When you actually start to put the nets in the water? A. Yes.

Mr. Lande: I have no further questions, your Honor.

Cross-Examination

By Mr. Toner:

Q. Mr. Carnevale, didn't you just say that you put the red light on when you are ready to set?

A. Yes.

Q. When you are ready to set? A. Yes.

Q. And what is the purpose of the red light? Why do you put the red light on?

A. So they won't cut the nets.

(Testimony of Salvatore Carnevale)

Q. So that other boats will stay away?

A. Yes.

Mr. Lande: He said so they would not cut the nets; so the other boats would not come close and run through the nets and cut them.

The Witness: Yes. [66]

Q. By Mr. Toner: However, you did make the statement that when you are ready to put the net in the water you put on the red light? A. Yes.

Q. Now, where were you? On top of the pilot house?

A. Yes.

Q. On top of the pilot house? A. Yes.

Q. What light did you see on the Gloria R?

A. What light I see?

Q. Did you see the red light or green light or both?

A. When he passed by I saw the green light.

Q. You saw the green light?

A. Yes. He go straight across to San Pedro.

Q. You saw the green light on the Gloria R?

A. Yes.

Q. And before that did you see any other lights?

A. No, I can't see the other light. When he turned I see the red light because he make a turn.

Q. And you were making a starboard circle, were you not? A. Yes, sir.

Q. And just before the collision you saw the green light? A. Yes. [67]

Q. And at the time of the collision—

The Court: Which light would the Bessemer have that would be visible to the Gloria R?

Mr. Lande: The red light—that would be the left light.

(Testimony of Salvatore Carnevale)

The Court: Would they be going in the opposite direction?

Mr. Lande: The rules of the road are, your Honor, that when you are red to red or green to green then you are in a passing position. Then if either boat desires to change its course they turn in back of it just like an automobile. You do not cut in front of a fellow.

Now, where you see red to green or green to red, that means a converging position and then the boat that has altered its course, they know at that time a collision is probably imminent.

The Court: Under such a setup wouldn't both boats be well advised that they were in danger?

Mr. Lande: Oh, yes.

Mr. Toner: If the court please, the testimony was that the Bessemer made a turn to the starboard like this. Now, that would automatically change the position of the red and green light from that situation.

Mr. Toner: The Gloria R is coming this way with her green light here and her red light there. [68]

The Court: According to the libelants' diagram the Bessemer had made a circle one way and then it made a circle the other way—

Mr. Lande: And then he said he was going straight ahead preparing to lower the net at about that time.

The Court: But he just made a turn.

Mr. Lande: He had completed his turn.

The Court: He was changing his course, was he not?

Mr. Lande: He completed his turn at that time and this boat here, which had circled on the outside, came to him and they were at this position here. They were both red to red.

(Testimony of Salvatore Carnevale)

The Court: And both of them changed their courses?

Mr. Lande: No. After he saw they were red to red he maintained his course, but the Gloria R swung in front of him and then skidded into his bow as he came too close to the front of it. In other words, just like you are driving down a slippery street and you turn too close in front of a fellow and your rear end skids and you hit him in the front. That would be comparable.

The Court: Proceed.

Q. By Mr. Toner: Now, when you saw the Bessemer, when you saw the Gloria R's red light, where on the Bessemer did you see it? In other words, what was the bearing to the Bessemer when you saw the green light?

A. First we was two or three hundred feet apart when [69] we make a turn and we see the boat—he pass in front like that. You see both the lights, this side and the other side when you are in front. If you make circle again you will be over here, see like that, and he come straight across. All the time he come straight across. We slow down because we have got to set when he is ready. When he is ready to set the boat is right alongside of us and we pass like that, and when he was right in front, about half way, he turned all at once and he hit us about like that.

Q. That was the only turn the Gloria R made, was that turn to the port immediately before the collision?

A. Yes, he turned when he hit us.

Q. That is the only turn he made?

A. That was the only turn he made.

Q. And then at that time the Bessemer was in this starboard circle? A. Yes.

(Testimony of Salvatore Carnevale)

Q. And so you were turning all the time?

A. Yes.

Q. And the Gloria R was coming along here straight?

A. Yes.

Q. And did not turn until just before the collision?

A. Yes.

The Court: Counsel, I do not understand Anthony Gloria R's testimony, because he indicated that he made a circle [70] and said that he took a course that would take him to San Pedro.

Mr. Toner: Yes.

The Court: And that is the way he set his course.

Mr. Toner: Yes.

The Court: And that he continued on his course. Now, according to his own chart he did not change his course after he set it for San Pedro.

Mr. Toner: That is correct. That is what this witness testifies to, that the Gloria R was on a straight course and the only turning was immediately before the collision. And that is what he testified to—that in order to avoid the collision at the last moment there was a turn to the port, but there was no previous turn, to try to explain this change of red to green as testified by Anthony Bessemer.

The Court: Any further questions?

Mr. Toner: That is all.

Mr. Lande: Just a minute.

Redirect Examination

By Mr. Lande:

Q. Mr. Carnevale, did you see the Gloria R make the big circle around you?

A. No, I didn't see him make a circle.

(Testimony of Salvatore Carnevale)

Q. You did not happen to see that?

A. No, sir. [71]

Q. Now, this turn that the Gloria R made to the left there, was that before she hit you or as she hit you or after?

A. No, when she hit she turn and hit us like that.

Q. He turned and then he hit you?

A. Yes, sir.

Q. He turned and then he hit you?

A. Yes, sir.

Q. And how fast was he going when he turned and then hit you?

A. Full speed, about eight miles an hour.

Q. When you were up in the pilot house there, the wheel house, were you on the port or the starboard side?

A. No. I was on the side we got hit on, the port side.

Q. You were on the red side. A. Yes, sir.

Q. When you were on the red side there that would be on the port side down here. Did you see his red light some time before the collision? A. Yes.

Q. When he was some way off?

A. Sure. When he was a little far you see it, but when he is close you see the green—that is all, because he pass close here, you see.

Q. In other words, you first saw his red light?

A. Yes. [72]

Q. And then you saw his green light?

A. Yes.

Mr. Lande: That is all.

Mr. Toner: That is all.

The Court: As I understand it, as far as the Respondent is concerned, the claim is they made a circle and then adopted a course that headed toward San Pedro.

The Libelants' chart would indicate that when they completed the circle they started east and then turned almost directly north, is that not true?

Mr. Lande: Yes, cut right in front of him, your Honor.

The Court: In other words, the picture would appear, according to the testimony of the Libelant, that the Respondent was paying no attention to Libelants' vessel, and cut right in front of him.

Mr. Lande: That is it precisely.

The Court: While the Respondent's chart makes it appear, and it is also corroborated by the last witness, the he was going in a northwest direction.

Mr. Lande: The last witness, your Honor, said he saw the red light. He said he was stationed over here and that he saw a red light over here. In other words, which would place this vessel over here in this position here and that he saw the green light after the Gloria R had turned and at the [73] time of the impact, but before then, before the impact, he saw the red light. In other words, he was on the red side and he saw the red light of the other boat.

Mr. Toner: I do not think counsel can avoid the statement that the Gloria R did not turn until just before the collision. That is what this last witness testified.

Mr. Lande: It was just before the collision, but it is a question of what you call "just before" he turned. Even their position here shows that they were crossing the bow of the Bessemer. Even in this position here it shows

the Gloria R crossing in front of him. Why didn't he come around here and avoid them. That would have been the simplest thing and it would have avoided the accident, but instead he chose to come so close that we have the collision occurring.

Your Honor will see the circle here of the Bessemer. It is the same as the circle here only this fellow drew a complete circle. So, we have them agreeing on the greater counter-clockwise circling of the Gloria R.

Now, we have also got them agreeing that the Bessemer was in her circle around the fish and we have one boat on the outside seeing the other boat on the inside.

The Court: All right, call your next witness. [74]

JACK OLSEN,

called as a witness by and on behalf of the Libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jack Olsen.

Direct Examination

By Mr. Lande:

Q. Where you you reside, Mr. Olsen?

A. San Pedro.

Q. And what is your occupation?

A. Engineer.

Q. Are you employed on fishing vessels?

A. Yes.

Q. How long have you been going to sea?

A. Oh, practically 40 or 41 years.

Q. And during that time what type of vessels have you sailed on?

A. All types—from the biggest to the smallest.

(Testimony of Jack Olsen)

Q. How long have you been working on fishing vessels?

A. Off and on, I should say, about 20 or 25 years.

Q. Now, when a fishing vessel is out to sea before the set is made, are you in the engine room or outside?

A. Well, sometimes I am in the engine room. Most of the time I am on deck.

Q. Now, on October 4, 1944, were you engineer on the [75] Bessemer?

A. Yes, sir.

Q. About nine o'clock that night, before the collision happened, whereabouts were you?

A. I was standing aft amidship, alongside of the hatch, on the port side of the vessel.

Q. All right. Now, will you step to the Libelants' diagram here and will put an X with my pen where you think you were just at the time—just about where you were standing?

A. I was standing just about right there.

Q. I will draw an arrow and label it "Olsen."

The Court: All right.

Q. By Mr. Lande: Now, Mr. Olsen, what was the condition of the visibility?

A. Very good.

Q. At that time?

A. Very good.

Q. Was it moonlight?

A. Moonlight and very good visibility. You could see for miles. Well, I will say you could see a dark—you could distinguish a dark object at night about five miles or six miles:

Q. All right. Now, you came on deck that night?

A. Yes. [76]

Q. Now, you were on the port side along about midships?

A. Yes, sir.

(Testimony of Jack Olsen)

Q. Now, did you see any other vessels?

A. Other vessels than the Bessemer?

Q. Yes. A. Yes; I saw the Gloria R.

Q. Now, where was the Gloria R when you first saw her? A. She was passing around our stern.

Q. And what light did you see on her?

A. When she passed around our stern?

Q. Yes.

A. Green light. They was outside of the—we were between her and the Island.

Q. You were between her and the Island?

A. Yes. That was when I first saw her.

Q. All right. Now, did you see her again?

The Court: Just a moment. Were you between the Gloria R and the Island?

The Witness: Yes.

The Court: I understand now.

The Witness: We were between her and the Island at the time I first saw her.

Q. By Mr. Lande: Did you see her again?

A. Yes. I saw her inside of us, between us and the Island. [77]

Q. And there was some difference of time between those two positions?

A. Yes, quite a bit of time.

Q. About how long?

A. I could not say—maybe fifteen minutes.

Q. Could have been more?

A. Could have been more.

Q. All right. Now, the second time you saw her between you and the Island? A. Yes.

(Testimony of Jack Olsen)

Q. And what light did you see on her then?

A. Red.

Q. You saw her red light? A. Yes.

Q. All right. Did you notice at what speed she was traveling?

A. Well, at that distance I could not say. Looked like she was going full speed to me.

Q. Now, at the second time you saw her what was your vessel doing?

A. Going in toward the Island.

Q. You were headed in toward the Island?

A. Yes, sir.

Q. And about how fast were you going?

A. Oh, we were going just at dead slow. [78]

Q. How many knots an hour?

A. Around one or one and a half.

Q. Now, at any time from that time up to the time of the impact did your speed increase or decrease?

A. Didn't increase or didn't decrease anything until we throw the clutch out.

Q. Now, you say you saw the red light of the Gloria R the second time when the Gloria R was between you and the Island? A. Yes.

Q. All right. Now, did you watch the Gloria R after that?

A. Yes. I saw her again when she passed around our bow.

Q. Now, tell the court just what you saw of it and what happened from the second time you saw the Gloria R, light up to the time of the collision?

A. Well, I saw the Gloria R come around our stern and went past our bow and I was standing on the port side of the vessel and I saw her red light.

(Testimony of Jack Olsen)

Q. I asked you from the second time. You started out giving your position the first time. You said you saw her come around your stern. That was the first time? A. Yes.

Q. Now, I am asking you after you saw her go around [79] your stern and make the circle around you, you saw her the second time between you and the Island?

A. Yes, sir.

Q. What did you see after that?

A. I saw the Gloria R coming towards us—that is, the red light coming toward us. I could not say it was the Gloria R, but there was no other boat there and I saw the red light and I turned around to the man standing by the skiff painter there to let go the skiff and I said to him, "I think we got a good school of fish here; I think we get a good load, and I turned around again and looked ahead and there was this green light right in front of me, right in front by the boat, so I turned around and I hollered to the gang, "Better brace yourself, we are going to hit and hit hard," and I heard the skipper holler up in the mast and then I heard the engine going in reverse full speed, so I braced myself too. I grabbed a hold of the hatch to hang on, but the impact wasn't as hard as I expected it to be because our boat was pretty near stopped.

The Court: How must time elapsed between the time you saw the red light and the time you saw the green light?

The Witness: Oh, I should say approximately, maybe one or one and a half or two minutes time. Time flies when you are talking to a person. You don't pay no attention to it. I could not say exactly. [80]

(Testimony of Jack Olsen)

The Court: But it was a short time?

The Witness: Yes, a very short time.

Q. By Mr. Lande: Now, did you see the impact between the two vessels?

A. No, not actually the impact. I did not see it because the house obscured the view from me where I was at on the deck.

Q. Did you feel your vessel move?

A. Yes, I felt the impact all right.

Q. Now, tell the court what you felt? How did it seem?

A. Well, the boat took a little list for one thing. You can feel the jar. I felt the jar.

Q. Which way did it take a list?

A. To the starboard.

Q. That is to the right? A. Yes.

Q. Now, right at the moment of the impact—strike that. Before the other boat hit you—before the boats came together could you hear the clutch go out?

A. Yes.

Q. That can be heard on deck?

A. Yes, you can hear it.

Q. And the clutch is controlled from the wheel house, is that right? [81]

A. That is correct.

Q. You heard the clutch go out? A. Yes.

Q. You heard it go in reverse?

A. Very much so.

Q. Could you tell from the sound of the gears and engine whether or not your boat was in reverse?

A. Yes; you can feel that any place on the boat.

Q. And you heard it go in reverse before the impact?

A. Yes.

(Testimony of Jack Olsen)

Q. How fast do you think your boat, the Bessemer, was going at the time that you felt the blow?

A. Well, not very fast. I would not say. I don't think it was a quarter of a mile. She wasn't quite stopped.

Q. How much of the Gloria R passed in front of your boat before the impact occurred?

A. Well, that would be—she was about amidships on her.

Q. Could you see?

A. No, I couldn't see from where I was standing at the time. I saw it afterwards.

Q. Could you see the front—that is, the front of the Gloria R pass in front of you before the impact occurred?

A. I saw it just before the impact. Yes, she was on the port side then. [82]

Q. She was?

A. From my position on the boat I could only see so far on account of the house in front of me.

Q. You were looking ahead, weren't you?

A. Yes.

Q. Now, from where you were looking ahead did you see the Gloria R pass in front of you? A. Yes.

Q. And you saw it pass in front of you for a matter of split seconds, but for some time before the impact occurred? A. Yes.

Mr. Lande: You may cross-examine.

Cross-Examination

By Mr. Toner:

Q. Mr. Olsen, you stated that you saw the red light of the Bessemer? A. Of the Bessemer?

Q. I mean the Gloria R? A. Yes.

(Testimony of Jack Olsen)

Q. And then you turned around and spoke for a minute or so to one of the fellow crew men?

A. Yes, sir.

Q. And then you looked up and you saw the green light of the Gloria R? A. That is correct. [83]

Q. Did you ever seen both the red and the green lights together?

A. That just depends on the distance you are away from the vessel.

Q. At this particular time?

A. No, you could not.

Q. You did not? A. I was too close.

Q. You did not see the red and green of the Gloria R at any time—at the same time? A. No.

Q. First you saw the red? A. Yes.

Q. And then there is a lapse and then you saw—you saw it for a minute or two minutes? A. Yes.

Q. And then you saw the green? A. Yes.

Q. But you did not see them simultaneously?

A. No.

Q. Now, at the time you are speaking of was your boat in a starboard circle around the fish?

A. Well, that I could not say for sure because I paid no attention. I was looking at the fish.

Q. When you are circling fish the entire crew is very [84] much interested in the size of the school?

A. Sure.

Q. Because that means money in your pocket?

A. Yes, you bet.

Q. So you are very definitely interested?

A. Yes.

(Testimony of Jack Olsen)

Q. And so is all the other crew interested in the size of the school?

The Court: Gentlemen, it is 12 o'clock and we will take our noon recess at this time.

Mr. Toner: I have only one question and then I will be through.

The Court: All right.

Q. By Mr. Toner: You state that your vessel was in a forward motion at the actual time of the impact?

A. Well, so far as I could judge by the time that elapsed and we were in reverse—it is bound to be a little forward motion because we did not have time enough from the time of reverse until the boat stopped.

Mr. Toner: That is all.

The Court: That is all. We will take our noon recess at this time until 1:30.

(Whereupon, at 12:00 o'clock noon, a recess was had until 1:30 p. m. of the same day.) [85]

Los Angeles, California, Thursday, May 16, 1946
1:30 P. M.

JACK OLSEN,

called as a witness by and on behalf of the Libelants, having been heretofore duly sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Lande:

Q. Mr. Olsen, this morning you testified, I believe, that the very first time you saw the Gloria R she was about a mile and a half or so away from you, circling around you, and you saw her green light. Is that right?

A. No, I was mistaken in that.

(Testimony of Jack Olsen)

Q. Tell the judge what you saw?

A. I saw the red light.

Q. Tell the judge what the correct statement is?

A. It should be red.

Q. And that was the first time you saw her.

A. Yes.

Q. Then you next saw her about 15 or 20 minutes later?

A. Yes, sir.

Q. The second time you saw the red light did you continue to see that light for any length of time?

A. Yes, for quite a while. I could not say exactly the time. Maybe three or four or five minutes. [86]

Q. Then you turned around and you were talking to some men there?

A. Yes.

Q. And which way were you facing when you were talking? I mean, were you facing out to sea or toward the boat or what?

A. Aft.

Q. Facing aft?

A. Yes.

Q. Then it was when you turned around after that that you saw the green light?

A. Yes, that is correct.

Q. Now, will you explain to the judge please, how a boat pivots when it is given a rudder to the right or to the left? In other words, how does a single screw boat turn, which is what the Bessemer was, wasn't it?

A. Yes.

Q. A single screw boat. Take a pencil or some object and show the judge how it pivots when it is given a hard rudder?

A. The rudder hard over forces the stern—say you want to swing to starboard, it forces the stern to port like that and the bow hardly swings at all.

(Testimony of Jack Olsen)

Mr. Lande: Of course the record does not show what he means by "by that." You mean you just showed us that when [87] you give the rudder to the right or left the stern moves to the right or left and the pivoting is at a point somewhere near the bow?

A. Yes, that is correct.

Mr. Lande: That is all I have, your Honor.

The Court: Any further questions?

Mr. Toner: I think that is all, your Honor.

Mr. Lande: That is the case of the Libelants, your Honor. Do you wish us to go ahead on the other issues?

The Court: Have you any additional matter on the question of liability?

Mr. Toner: Yes, I have some of the crew here.

The Court: Let us hear from them.

Mr. Toner: If the court please, this man has some trouble with the English language. I had planned to have an interpreter here but was unable to get one.

The Court: I am not able to understand Italian. It is up to counsel to provide an interpreter.

Mr. Toner: I talked to Mr. Lande and it is agreeable with him that we use one of the members of the crew. Is that correct?

Mr. Lande: You can use my captain.

Mr. Toner: Will that be satisfactory to the court?

The Court: Yes.

Mr. Lande: But it is a little unusual. [88]

Mr. Toner: It is rather unusual.

Mr. Lande: You can use my captain. It is perfectly agreeable with me. I am sure he will do it accurately for the court.

The Court: Very well, swear him as an interpreter.

Anthony DiLeva (Boat Bessemer) was thereupon duly sworn to interpret from the English into Italian and from the Italian into English.

BIAGO CUMMO,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Biago Cummo.

Direct Examination

By Mr. Toner:

Q. What is your address? A. 383 9th Street.

Q. And you were a member of the crew of the Gloria R on October 4, 1944? A. Yes.

Q. Now, where were you on the Gloria R at the time of the collision? A. I was at the wheel.

Q. And is the wheel in the pilot house? [89]

A. On top of the pilot house.

Q. And Anthony DiLeva (Gloria R) was in the crow's nest? A. On top of the mast.

Q. And Jack Conpaglasi was lookout at the bow?

A. Yes.

Q. You made a large circle.

The Court: There is no dispute about making a large circle, is there, counsel? Why don't you ask the witness what he saw of the accident and let him explain it, and

(Testimony of Biago Cummo)

then you can ask a few questions about the lights and so forth.

Q. By Mr. Toner: Now, Biago, starting from the time you were at the easterly end of the Island, will you explain to the court what you did and what happened that night?

The Interpreter: He saws after we got to the east end he turned to go back to Avalon again.

Q. By Mr. Toner: And then after he turned to go to Avalon what was his course?

A. It was out—we go inside.

The Interpreter: He said he went around this and then he come—

The Court: Just a moment. I think I made a mistake in suggesting that he tell his story. Ask him definite questions and get the answers.

Q. By Mr. Toner: When you were at the easterly end [90] of the Island did you turn toward San Pedro?

A. We stay east of the Island—turned for the fish. Turned outside Avalon. The moon come up one hour already. We stay out—outside of Avalon. We take a course northerly—northerly by northwest a little bit and we go straight. We see the other boat got a green light.

Q. You saw another boat that had a green light on it?

A. Yes, this boat.

Q. And how far off was that boat?

A. About a couple hundred yards maybe. About a quarter of a mile we see the boat.

Q. About a mile?

A. Quarter of a mile we see the green light.

(Testimony of Biago Cummo)

Q. And where was the green light with reference to your boat?

A. This side on the bow. We are going east. We are going straight. We go straight for San Pedro and we see the green light on the bow.

Mr. Toner: Don't argue with him.

The Interpreter: I don't want to argue with him. I want this man to interpret. He thinks I am arguing. Let his man argue with him.

The Court: You don't have to do any arguing. .

The Interpreter: He argues with me. He thinks I am trying to change his story. [91]

The Court: Very well, if you want to swear the Respondent you may do so.

Anthony DiLeva (Boat Gloria R), was thereupon sworn as an interpreter to interpret the English into Italian and Italian into English.

The Clerk: State your full name.

The Interpreter: Anthony DiLeva.

Mr. Lande: May the record show this is the Anthony DiLeva from the Gloria R?

Mr. Toner: Yes.

Mr. Lande: Who is now acting as interpreter?

Mr. Toner: Yes.

Q. By Mr. Toner: Now, start from when you set your course toward San Pedro and tell the court what happened. Give him that.

The Witness: Went a little bit northwest.

(Testimony of Biago Cummo)

Q. What happened then?

A. We see the boat on the bow got green light.

Q. You saw the green light? A. Green light.

Q. Of another boat?

A. We see the boat got green light. We go north by northwest.

Q. And how far off was that boat?

A. Maybe a quarter mile. [92]

Q. And was that boat off your port bow or directly ahead or what?

A. It is going east. We try to pass on the stern. We see all the time the green light. We seen green light and red light. I can't turn around to my right, see. This is what he was doing. We going straight. We see green light and red light both and he holler. All of a sudden I heard hollering from the pilot house. The boat back up, see. It is going fast. We move the wheel here too close.

The Interpreter: He says when the Bessemer got close, just when the boats were about to hit, he says he heard the crew of the Bessemer hollering, the man on the pilot house, and he says as soon as they hit the boat, the boat was going in reverse—his boat. He says when they hit the boat was going astern full speed but that was after they hit.

Q. Now, when the Bessemer hit the side of the Gloria R—

Mr. Lande: I object to that as leading.

The Court: He will have to lead this witness. You cannot get this testimony without leading. The objection is overruled.

(Testimony of Biago Cummo)

Mr. Lande: He is assuming a fact not in evidence. I do not recall hearing this witness testify which boat struck the other. He said they came together.

Mr. Toner: After all, what we are trying to do is get [93] the facts.

Mr. Lande: Let us hear them from the witness and not from you.

The Court: The court permitted you to lead the witness but as soon as opposing counsel starts to lead the witness you complain about it.

Mr. Lande: I am not complaining about the leading. I complain merely about the fact in this particular question. It seemed to me, and I may be mistaken, as to whether or not this man so testified, but it seemed to me he had not testified as to which boat hit the other and this question that he put to him, the objection should not have been that it was leading.

The Court: There is no argument as to how the boats collided as far as the evidence is concerned. There is no particular conflict here as to how the boats came together. What I am trying to determine is just how these boats came together under those circumstances.

Q. By Mr. Toner: Did the Bessemer hit the Gloria R? A. The Bessemer hit us.

Q. When the Bessemer hit the Gloria R was the Bessemer moving forward or backward?

The Interpreter: He says the Bessemer was going ahead when they hit him.

Q. And when the Bessemer was proceeding on an easterly direction and you saw her green light, was she ahead of you? [94] Was she forward of you?

(Testimony of Biago Cummo)

The Interpreter: He says the boat was ahead of him.

Q. And did the Bessemer cross your course?

A. The Bessemer passed in front of my course.

Q. And after the Bessemer passed in front of your course did the Bessemer make a turn?

The Interpreter: He says "Yes, the boat turned to us."

Q. And what kind—

The Court: That is different from the testimony of the skipper.

Mr. Toner: I have to take this witness as I find him.

Q. And did the Bessemer make—you said the Bessemer made a turn. What kind of turn did the Bessemer make? To port or to starboard?

A. On the green light.

Q. He made a turn on the green light?

A. On the green light.

Q. To the right?

A. To the starboard. That would be the right.

Q. On the green light like this?

The Interpreter: He said the boat turned to the starboard, to the right.

Q. Toward the green light? A. Yes.

Q. Now, if the Bessemer had not made this turn to the [95] green light or turned to the starboard, would you have cleared the stern of the Bessemer?

A. You know this boat he come around—

The Interpreter: He says, "Well, if he would have kept on his course—" You ask would the Bessemer have cleared this boat and he says, "Yes, yes, we would have cleared the Bessemer, too."

(Testimony of Biago Cummo)

Q. You would have passed to the stern of the Bessemer? A. Yes.

The Interpreter: He said he would pass the stern of the Bessemer.

Q. And the Bessemer was then proceeding when you first saw her in an easterly direction?

The Interpreter: He says, "Yes"; that he was laying east—that is why he could see his green light.

Q. Going east? A. Laying east.

Q. Was the boat headed in an easterly direction?

A. Yes.

And this starboard turn caused the Bessemer to head in a westerly direction, is that it?

A. Sure, he turned around.

The Interpreter: He says he was laying east when he turned west—turning west, that is how he hit them.

Q. Was this turn that the Bessemer made on a semi-circle? [96] A. Half a turn.

The Interpreter: Half a turn is what he said. I asked if the Bessemer made a turn and he said, "When I saw the green light I saw him turn. We saw the green light and the red light this way. He turned."

He says while he is making the turn he hit the Gloria R. That is when he spotted both of the running lights, the red and green when he was coming onto him. That is what he said.

Q. Now, where on the Gloria R did the Bessemer strike? A. Strike at the mast.

Q. You call that amidships? A. Yes.

Q. On the Gloria R is there a switch to turn on the red mast light?

The Interpreter: Yes, there is a switch.

(Testimony of Biago Cummo)

The Court: You are not supposed to answer the questions.

Q. By Mr. Toner: Ask him the question.

The Interpreter: He wants to know if he had one.

The Witness:: Sure, we got it.

Q. By Mr. Toner: And what is the purpose of that masthead light?

A. Well, put the red light on top of the mast when you are on the fish, when you see the fish, the school of fish, then you light the red light and turn around on top of the [97] fish.

Q. Why do you put on the red light?

A. So some other boat—for the other boats.

The Interpreter: He means some other boat can see them.

Q. By Mr. Toner: Some other boat what?

The Interpreter: You put the red light on for boats that are coming towards you, to warn them you are on the fish. You got your red light on to tell them to stay away because you are on the fish.

Q. When do you put on the red light?

The Interpreter: He says when you get on the fish.

Q. Before you put your net out? A. Sure.

Q. And is that the custom around San Pedro?

A. Well, that is the fishing regulation at San Pedro.

Q. Was there any red light on the masthead of the Bessemer? A. No.

The Court: The Libelant does not claim there was.

Mr. Toner: I wanted to establish that.

The Court: They admit it.

Q. By Mr. Toner: Now, between the time you left the east end of Avalon and the turn you made within a

(Testimony of Biago Cummo)

couple of seconds did you make any change in your course? A. No, no, no change of course. [98]

Q. When did you first change your course prior to the collision?

The Interpreter: You want to know if he changed his course when they were about to hit?

Mr. Toner: That is the question.

The Court: Gentlemen, I have put up with just about as much of this as I am going to. I am not blaming you. I am not blaming anybody; but I am not going to have this kind of a situation. I have sat here and witnessed a procedure that this court is not going to tolerate. If you people cannot secure an interpreter I cannot pay any attention to this testimony. There is a dispute here even as to the questions that are asked and they are all interested parties who are acting as interpreters. It is not satisfactory. I shall not consider this testimony of any value one way or the other.

Mr. Toner: If the court please, the important thing that this witness can testify to is the lack of a change of course between the time he left the easterly end of Catalina Island until—

The Court: I cannot understand his testimony; but simply because he adopts a course that does not give him the privilege of running into another boat.

Mr. Toner: Of course not.

The Court: I understand his testimony relative to that, but this method of interpreting in a case and conducting a [99] trial is not going to be tolerated.

Mr. Toner: I appreciate that it is rather unsatisfactory.

(Testimony of Biago Cummo)

The Court: There are plenty of Italian-English interpreters you could obtain. They are not difficult to obtain. There are plenty of disinterested parties who could have been called here as interpreters in this case.

You have an argumentative witness and you have an argumentative Libellant on one side and an argumentative Respondent on the other side.

Mr. Toner: May I proceed, if the court please, with this interpreter by asking just a few questions?

The Court: Proceed.

Q. By Mr. Toner: Just before the collision did you make a turn to port? Now you interpret that—may this be off the record, please?

The Court: Yes.

The Witness: No.

Q. By Mr. Toner: Immediately before the collision I am referring to?

A. No. Going straight northwest—north by northwest.

Q. And you made no turn? A. No.

Q. At all?

A. No, because the boat pass already.

Q. Did you try to avoid the collision? [100]

The Interpreter: Well, he said he tried. He says he already figured they had passed the stern of the Bessemer. He said he figured he passed the Bessemer's stern already.

Mr. Toner: I think that is all.

Mr. Lande: No questions.

NICOLA CURCI,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nicola Curci.

Direct Examination

By Mr. Toner:

Q. Where do you live. A. 8th Street.

Q. What is the address? A. 545.

Q. San Pedro? A. Yes.

Q. Were you on the Gloria R at the time of the collision on October 4, 1944? A. Yes.

Q. And where on the boat were you?

A. On the boat what?

Q. Where were you on the Gloria R? [101]

A. Alongside Biago on the pilot house.

Q. When you started toward San Pedro what course did you follow?

A. The moon came up early and the skipper says, "Not enough fish." He says, "We better go home," and he is going north by a little bit west just to San Pedro.

Q. Did you see the lights of any other ship?

A. I see the green light about three-quarters of a mile out off of the Gloria.

Q. Ahead of the Gloria or to one side?

A. The other boat I see the green light—that is, the Bessemer.

Q. Was that ahead of the Gloria R?

A. Bessemer ahead of the Gloria R.

Q. You saw it about three-quarters of a mile away?

A. Yes.

(Testimony of Nicola Curci)

Q. What direction was it going?

A. The Gloria R?

Q. The Bessemer?

A. He is going little bit, I think, east.

The Court: East?

Mr. Toner: Yes, a little bit east.

Q. And as the two ships—as the two fish boats approached what happened then?

A. What happened then. We going right to San Pedro and [102] the Bessemer he come in—

Q. The Bessemer come into the Gloria, is that what you said?

The Interpreter: That is what he said.

Q. By Mr. Toner: The Bessemer came into the Gloria R? A. Yes.

Q. And hit the Gloria R?

A. Hit the Gloria R.

Q. And was the Bessemer making a turn?

A. No, going straight.

Q. The Bessemer was going straight?

A. Yes.

Q. And went into the Gloria R? A. Yes.

Q. Was the Bessemer on the fish?

A. Yes, he is on the fish.

Q. And was he making a turn on top of the fish?

A. He make one turn, see, on top of the fish. He make one turn on top of the fish. Maybe find no more fish and he started to run again.

Q. Now, what direction was the Bessemer headed in when it collided with the Gloria R?

A. I don't understand what you mean.

(Testimony of Nicola Curci)

Q. When the collision happened what direction was the Bessemer headed in, when the two boats came together? [103]

A. Right through the kitchen and the mast.

The Court: The question was, what direction was the Bessemer traveling. And according to the witnesses here they are almost in accord on that. They said the Bessemer was headed in a westerly direction.

Q. By Mr. Toner: Was the Bessemer headed west at the time of the collision? A. Yes.

Q. Now, did the Bessemer have any mast light on?

A. No.

Q. What lights were on the Bessemer?

A. Just the green light.

Q. The running lights?

A. Yes, running lights—that is all.

Q. Green light on the starboard and red light on the port? A. Yes.

The Court: I do not understand the significance of the red and green lights as well as you people; but assuming that the Bessemer was headed in a westerly direction and the Gloria in a northwesterly direction, that is, going toward Catalina Island, which light would be visible from the south:

Mr. Toner: Which light of the Bessemer, your Honor?

The Court: Yes.

Mr. Lande: The left light or red light. [104]

The Court: You are talking in a language that is rather difficult for me to follow.

Now, according to each of these diagrams the Bessemer was headed toward Catalina Island?

(Testimony of Nicola Curci)

Mr. Lande: Yes, sir.

The Court: And the Gloria R was approaching her going in a northwesterly direction?

Mr. Toner: Yes.

The Court: Now, as they approached which side of the Bessemer would have the red light?

Mr. Lande: The left side or south side.

Mr. Toner: Red light on the left side and green light on the other side.

Q. Now, as the Bessemer was ahead of the Gloria R, if the Bessemer was ahead of the Gloria R, and in this position, if the court please, the green light would be visible on this side and the red light would become visible only when she turned into that position?

The Court: I understand that part of it.

Mr. Toner: There is a catch phrase that identifies the lights by this means—it says “Red-left-port.”

The Court: I understand that but I cannot keep it in mind, but you may proceed.

Mr. Toner: You are familiar with the San Pedro custom with reference to a masthead light? [105]

A. San Pedro custom—masthead light? Well, when you are not on the fish—

Q. Just answer whether you are familiar or not. Do you know the custom? A. Yes, sir.

Q. What does the custom mean?

A. The custom—you have a red light on top of the mast. It means danger, you see, you better look out, you better go away.

Q. And when do you put on the masthead light?

A. Well, sometime you—when you are on top of the fish. Sometimes you may be on top of the fish and you run the boat about a half hour sometimes with it on.

(Testimony of Nicola Curci)

Q. Was there any red light on the Bessemer?

A. No.

Mr. Toner: That is all.

The Court: Just a moment. Did you see a red light at any time on the Bessemer?

The Witness: No, sir.

The Court: That is all. All you ever saw on the Bessemer was the green light?

The Witness: That is all.

Cross-Examination

By Mr. Lande:

Q. Isn't it true it is also part of the custom just [106] to put the red light on just as you lower the net?

A. That is the law. The law is you have got to have a red light on top of the mast.

Q. When the net is being lowered?

A. (No answer.)

The Court: Any further questions.

Mr. Lande: I am trying to think, your Honor, whether I have anything further.

Q. After you made your big turn around here and you came back to the Island and started out toward San Pedro, were you going home, is that right?

A. Yes.

Q. You were not circling for fish then, were you?

A. No.

Q. And you did see the Bessemer circle for fish, didn't you?

A. Yes, sir.

Q. What?

A. I see one time stop. I don't know find fish or not.

(Testimony of Nicola Curci)

Q. But you saw her at least make one circle?

A. Yes, sir. I don't know if she find the fish or not.

Q. You could have just as well steered your boat a quarter or a half a mile from where the Bessemer was, couldn't you?

A. About three-quarters of a mile. [107]

Q. And from that three-quarters of a mile you went up to where the Bessemer was, didn't you?

A. Went right through to San Pedro.

Q. And you went about eight knots an hour?

A. About seven or eight knots an hour.

Mr. Lande: That is all.

The Court: That is all.

Mr. Toner: That is all I have on the liability phase.

Mr. Lande: Anthony DiLeva of the Bessemer, will you take the stand?

ANTHONY DiLEVA (Bessemer),

called as a witness by and on behalf of Libelants, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Lande:

Q. Tony, when did the sardine season start in the fall of 1944?

A. Well, usually start October 1st but it happened that the full moon fell on October 1st and you don't fish for a period of five or six days. You don't fish on the full moon, so we start about the 4th, which was the first day.

(Testimony of Anthony DiLeva—Bessemer)

Q. Did you take on your crew before then?

A. Yes, I did.

Q. Now, is there a custom and practice in San Pedro [108] as to the hiring of crews at the beginning of a season?

A. Oh, yes, you hire them.

Q. Explain to the Judge what the custom is when you hire a crew?

A. Well, you hire—usually hire the crew before the season and they help you make the nets and fit the boat for sardines and that is all there is to it. Then you hire them for the whole season. Then they can quit any time they want, but you can't fire them during the season, or you get sued for their pay, for their share of the season.

The Court: Let me ask you this: Who did this boat belong to?

The Witness: Van Camp.

The Court: How did you happen to be operating it?

The Witness: They chartered the boat to us.

The Court: To whom?

The Witness: To me and my father. I was acting skipper.

The Court: And what were the terms of the charter?

The Witness: We put on our own nets. You see, the boat works on a share basis.

The Court: Were you gentlemen able to agree at lunch time as to whether this former written charter was still being recognized as the agreement between the parties?

Mr. Toner: I am inclined to believe, if the court please, it was not. I have a witness here who is with

(Testimony of Anthony DiLeva—Bessemer)

the [109] Van Camp Sea Food Company. I believe that he is the best witness to explain the nature of the arrangement.

The Court: Very well, we will hear both sides. Where is your father?

The Witness: He is home. He don't feel so good.

The Court: How do you know what the terms of the agreement were?

The Witness: Because I was there.

The Court: At the time you chartered the boat?

The Witness: Yes.

The Court: Who did you make your agreement with?

The Witness: With the Van Camp Sea Food Company.

The Court: And in substance what was that agreement?

The Witness: That we run the boat and that we do all the hiring, firing, and that we bring the boat as best we can—go out fishing, bring the fish in for them and that we hire the crew and we put on our own nets and when we make count on payday they take so much and the boat takes so much of the shares.

The Court: How much does the boat take?

The Witness: It varies. It is according to the union. When you have 13 or more men you get five and three-quarters shares—that is boat and net. When you have less than 13 men on it you have five and a quarter shares, the boat and men. Well, it happened we had 14 so we would get five and three- [110] quarters. Well, the boat would get three shares and the net would get two and three-quarters. Then the Van Camp give us, allowed us, give us a half share for me and my father to split for

(Testimony of Anthony DiLeva—Bessemer)

acting, for bringing the boat, fishing, and then each man has a share of their own. That is the way they split the money. In other words, we would be getting the net and half a share for running the boat. They would give us three and a quarter shares and the boat would actually get two and a half and then each man, as many men as you have, you have one share for each person on the boat.

The Court: That is all.

Mr. Lande: That is all I have, your Honor.

The Court: That is all the questions you have?

Mr. Lande: All from this witness. You may cross-examine.

Cross-Examination

By Mr. Toner:

Q. How old are you, Tony? A. 25.

Q. When was this contract that you are speaking about made? A. 1941.

The Court: You have been using the boat ever since then?

The Witness: Yes; we bought it since then.

The Court: What? [111]

The Witness: We have bought the boat since then.

The Court: You have bought the boat since the collision?

The Witness: No, afterwards we bought the boat. We have been running—we ran it three years and then we bought it.

The Court: Who owns the boat now?

The Witness: We do now.

The Court: How long have you owned it?

The Witness: Oh, about a year and a half now.

(Testimony of Anthony DiLeva—Bessemer)

The Court: In other words, since the accident?

The Witness: Since the accident, yes.

Q. By Mr. Toner: There were 14 men as a full crew?

A. Yes.

Q. I notice that there are only 13 men joined as Libelants. Who did not join as a Libelant?

A. Well, at first they said I could not be a Libelant. They said that we had—that I had to sue later. That is why.

The Court: But you appear here as a Libelant.

The Witness: Yes.

Mr. Lande: I took the crew list, your Honor, and I don't think I left any out.

Q. By Mr. Toner: Was Pete Barbari a member of your crew?

A. I am pretty sure he was—no, no, he wasn't at that [112] time. Well since then, your Honor, you know they come and go. They quit and then you hire somebody else and they have a list of all the crew, but I don't know if Barbari was on or off.

Q. By Mr. Toner: He might have been a member of your crew at the time of the accident?

A. He could have been, sure.

Mr. Toner: That is all.

The Court: That is all.

Mr. Lande: I have nothing further, your Honor. The Libelant rests.

Mr. Toner: If the court please, I do not see that there is any proof of damage particularly, but I am going to put on a witness even though I may run the risk of proving the Libelants' case.

(Testimony of Anthony DiLeva—Bessemer)

The Court: I am interested in the agreement under which this boat was chartered.

Mr. Lande: I will offer it, your Honor, for whatever it is worth.

The Court: That is an agreement that has expired.

Mr. Lande: By its terms it has expired, but evidently—

The Court: But they said they have gone through under it.

Mr. Lande: And this is the one.

The Court: He made a clear statement as to the agreement. [113]

Mr. Toner: I think we should have that agreement in evidence, however.

The Court: Will the parties stipulate to its introduction in evidence?

Mr. Toner: Yes.

The Court: Is that the original?

Mr. Toner: It is a duplicate of the original.

Mr. Lande: I think that gentlemen there can identify it.

Mr. Toner: We will stipulate this agreement was made on the 11th of September and we will put the agreement in for whatever it is worth.

The Court: If it is in evidence it will be for whatever it establishes.

Mr. Toner: That is correct.

The Court: It may be received.

(The document referred to was marked as Libelants' Exhibit No. 3, and was received in evidence.)

Mr. Toner: Mr. Gerstle, will you take the stand?

FENTON K. GERSTLE,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Fenton K. Gerstle. [114]

Direct Examination

By Mr. Toner:

Q. Mr. Gerstle, where do you live?

A. At 1207 Bank Boulevard, Wilmington.

Q. And what is your occupation?

A. I pay the fishermen for all fish delivered and make their disbursements.

Q. By whom are you employed.

A. Van Camp Sea Food Company.

Q. And who owns the Bessemer?

A. At the present time it belongs to the Anthony DiLevas—to Anthony DiLeva and his father, Salvatore DiLeva, but at that time, at the time of the collision, the Van Camp Sea Food Company owned the boat.

Q. And did the Van Camp Sea Food Company also own the Gloria R at that time? A. They did.

Q. What was the nature of the agreement with the fishermen aboard the fishing boat Bessemer at the time of the collision?

A. Well, I personally was not familiar with any agreement because I had not seen it, although we do make agreements.

Mr. Lande: I object to any further statements as immaterial. [115]

The Court: The written agreement, you mean?

(Testimony of Fenton K. Gerstle)

Q. By Mr. Toner: You are speaking of the written agreement?

A. Yes; we line up boats that will fish for us during the season so that we know approximately what to expect in—how many boats will be fishing. We don't want to overload our plant, and at the same time we want to have enough boats.

The Court: As I understand your testimony you do not know under what conditions the DiLevas had possession of this boat?

The Witness: Well, I am satisfied—

The Court: It isn't a question of whether you are satisfied. I am asking you if you know.

The Witness: I know—I did not see that particular agreement.

The Court: Then you don't know of any oral agreement, do you?

The Witness: Well, I have seen others and—

The Court: It is not a question of your seeing others.

The Witness: No; I wasn't in on any negotiations, no, sir.

Q. By Mr. Toner: What is the system whereby the DiLevas were paid for the fish they caught on board while they were operating the Bessemer?

A. It is on a share basis. For instance, if there [116] are 14 men on board each take a share and the boat takes five and three-quarters shares. If there are 19, there would be 19 and $\frac{3}{4}$ shares to be divided after the expenses are paid, consisting of dockage, fuel and oil and ice and cleaning and so on—incidental things that are in union agreement contracts or set up by the union.

(Testimony of Fenton K. Gerstle)

Q. That is the customary shares agreement?

A. Yes, sir.

Q. And that is what is referred to as the fishermen's share agreement?

A. Yes, sir.

Q. And most of your boats are operated under that agreement?

A. I would say all sardine boats are run that way.

Q. And as far as you knew was the Bessemer run that way?

A. Yes, sir.

Q. You paid them in accordance with the usual custom?

A. I paid them that way, sir.

Q. Will you explain to the court how you arrive at the fish settlements?

A. We take the gross catch in which it comes to us in pounds or tons and figure at \$22.00 a ton. We deduct operating expenses, consisting of fuel or oil, dockage and Association dues, which is a customary charge, and deduct [117] that from the gross. The balance is divided into shares according to the number of men on the boat for the particular fish caught.

Q. For that particular—

A. Amount of fish that is caught.

Q. On that particular day?

A. Day or days, as the case might be, if it is the same crew.

The Court: In other words, as I understand it, if there were 14 men in the crew the boat and the nets would get 5 and $\frac{3}{4}$ shares?

The Witness: Yes, sir.

The Court: And that would make a total of 19 $\frac{3}{4}$ shares?

The Witness: That is right.

(Testimony of Fenton K. Gerstle)

The Court: And the net amount received from the catch after all expenses—

The Witness: Yes, sir.

The Court: —is divided?

The Witness: $19\frac{3}{4}$ shares—that is right. Out of that the company pays back to the captain one-half share. The reason for that is that it gives the captain an operating responsibility, a part over and above an equal share that the crew gets.

Q. By Mr. Toner: Now, provisions are deducted?

A. As an individual item—not part of the operating [118] expenses as far as the boat is concerned.

Q. So the boat does not pay for the provisions?

A. It pays no groceries.

Q. The groceries are deducted from the amount the men get?

A. Yes. Now that I might add—that is not always true. It is true, I think, in all cases but I don't always do that because some boats take their money home and do their own dividing, but in cases where I do and they give me that to do, I subtract their groceries and pay their grocery bills for them.

Q. What was done on the Bessemer.

A. We paid their groceries and made checks to the individual stores for the total grocery bill.

The Court: Let me ask with reference to the Bessemer, is it only used for sardine fishing?

The Witness: Well, and tuna. It operates, you might say, the year around when there are fish available.

The Court: That is all.

Q. By Mr. Toner: You made some compilation of the earnings of the crew of the Bessemer at that time at my request? A. I did, sir.

(Testimony of Fenton K. Gerstle)

Q. Will you explain to the court what these compilations for the month of—how these tabulations for the month [119] of October 1944 were arrived at?

A. May I read this?

Q. Yes.

Mr. Toner: I propose to offer these in evidence, if the court please.

The Court: Yes.

The Witness: For the 14th, 16th, 17th and 18th, which are four deliveries, there were 18 and $\frac{3}{4}$ shares for that amount of gross fish of \$2,926.55. We had expenses of \$94.27; and taking out two and three-quarters shares for the boat left \$2,416.80 belonging to the crew. That was divided among 13 men.

For the next period the crew consisted of one more man. We had five deliveries and the gross was \$4,771.80. Expenses were \$69.42. The boat took two and three-quarter shares as usual, leaving \$4,047.53 to be divided among the crew of 14 men. We had a third change in the crew of two days only, the 27th and 28th. The gross was \$2,167.00; expenses were \$46.51. Taking away the boat's share of \$311.05 left \$1,809.44 for the crew; and that was back to 13 men again.

Mr. Toner: Now, I offer or I would like to have the settlement tabulation for October 1944 marked in evidence. It consists of a large yellow sheet and three supplemental sheets—fish settlement sheets.

The Witness: That is right. [120]

The Court: They will be admitted next in order.

(The document referred to was marked as Respondent's Exhibit No. B, and was received into evidence.)

(Testimony of Fenton K. Gerstle)

Mr. Toner: I would likewise offer in evidence a similar tabulation for November of 1944 as Respondent's Exhibit C, and a similar tabulation covering the period for December, 1944, marked as Respondent's Exhibit next in order.

The Court: The documents will be received.

(The documents referred to were marked as Respondent's Exhibits C and D, respectively, and were received into evidence.)

The Court: How many fishing days would there be in October? As I understand, October 4th was the first day this boat went out. Is it possible that for each of those days, the eight days that the boat was laid up, could it have actually been fishing? I want to know what the contention of the parties is.

Mr. Lande: Our contention as shown by the report of the California State Fish and Game Commission, shows that during that period, October 4th to the 13th, 89 vessels, which composes the fleet in Los Angeles harbor, brought in 66 million and some-odd pounds of fish. That is on the first paragraph of the Fish and Game letter. That shows 66 million, 389 thousand, 68 pounds of sardines were delivered in the Los Angeles Harbor between October 4th to 13th, 1944, both dates inclusive. [121]

The Court: But what I am interested in is if this boat could have brought in fish each of those eight days. For instance, the report on the first tabulation for October shows there were deliveries on the 14th, 16th, 17th and 18th and then it shows deliveries on the 19th, 21st, 23rd, 24th and 25th, and the 27th and 28th. There are

(Testimony of Fenton K. Gerstle)

11 deliveries of fish from the 13th of October to the 30th, a period of 17 days. I am not certain that you understand what is in my mind. While you have stipulated there were 8 fishing days would each one of those days be a producing day?

Mr. Lande: It will be our contention, from what the captain tells me—I would like to ask to re-open the case to put on his testimony as to whether at the beginning of the season the fish were running heavy and whether he could have fished every day during that period of time.

The Court: I am going to let you argue that later. I am trying to get the facts and trying to get the picture in my mind.

Mr. Toner: Mr. Gerstle, you are familiar with the fishing operations. As a matter of fact, you are very familiar with them.

The Court: That is your business.

The Witness: Yes, sir; but I am not a fisherman. I do not go out to sea.

Q. By Mr. Toner: Will you explain to the court what [122] the fishermen mean when they call it "dark"?

A. Well, it is between the period, during the calendar month after the full of the moon is past two days until two days before the full of the moon.

Q. In other words, they cannot fish during the full of the moon?

A. No. It is not a State law, but it is an agreement between fishermen. They take five days in there during the full of the moon. They do not fish.

Q. Do they fish for sardines at night?

A. Yes, sir.

(Testimony of Fenton K. Gerstle)

Q. Is it the reason they fish sardines at night because they locate the schools of fish by the fire?

A. Phosphorescence in the water.

Q. And that phosphorescence cannot be seen during the full of the moon?

A. No, sir; it is not so good they claim. They claim the fish are probably not so good either. I am not so sure of that.

Q. In October 1944 when did the dark start?

A. Well, the season opened the 1st and it was either three or four days—I just don't have anything to refer to, but around the 4th or 5th of October.

Q. Now, the fishermen do not fish on Saturday night, is that right? [123]

A. No, sir; they do not go out Saturday night. We take no fish on Sundays.

Q. Because you take no fish on Sunday?

A. That is right. They do not go Saturday night.

Q. So one day of a week is out?

A. That is right.

Q. All other days during the month, with the exception of Sundays, are fishing days?

A. Except for the five days during the full of the moon.

Mr. Lande: If the court please, in this tabulation that counsel has submitted, there are two fishing days that are not listed, and I would like to ask this witness the question as to whether or not any fish were brought in at that time. I am speaking with reference to the 19th and 26th. Do your records indicate that the Bessemer brought any fish in on October 19th, rather than on October 20th and on October 26th?

(Testimony of Fenton K. Gerstle)

The Witness: We paid for no fish—for no deliveries on those dates. We did not pay for any fish delivered on that day because we did not receive any.

Cross-Examination

By Mr. Lande:

Q. On the other days that you have skipped, they are apparently Sundays, is that right?

A. Well, I believe there would be some dates in there. [124] I would say they were—what we call “missed that night.”

Q. What do you mean by that?

A. Did not catch any fish.

The Court: “Lost Weekend,” as I understand it.

The Witness: Went out and didn’t find any fish or didn’t go out. I can’t answer for them. I wasn’t along.

Mr. Toner: In any event, they did not deliver any fish?

The Witness: They did not deliver any fish, no.

Mr. Toner: That is all.

Q. By Mr. Lande: Mr. Gerstle, what did you say about \$100.00 would be the ordinary expense the boat would run into as far as the boat’s share was concerned for the eight days?

The Court: For each day.

Mr. Lande: Eight days—eight days figuring around—

A. Well, I will tell you—it largely depends if they go out consistently every night, which is possible, it would be that much, but if they go out and miss and they lay in shelter of the Island for protection it probably would not run that much.

Q. \$100.00 would be a liberal allowance?

A. I think it is too much.

(Testimony of Fenton K. Gerstle)

Q. Let me show you Libelants' Exhibit 1. I want you to look at the second page of this attachment, Mr. Gerstle; and it has been stipulated that the record of the Fish and [125] Game Commission would disclose this to be the deliveries in pounds of sardines during October, November and December? A. Yes.

Q. I want you to look that over, the dates and the pounds delivered and the totals and— A. Yes.

Q. Now, Mr. Gerstle, wouldn't you say that vessel and the crew were hitting the fish pretty well and getting good catches during that time?

A. Well, I said if they worked consistently, yes.

Q. You say they did? A. I think they did.

Q. They were lucky or skillful enough to get good results? A. Yes.

Q. Is that correct?

A. Have you compared it with some other boat that could do better?

Q. I am talking about the average of your fleet down there. You have got quite a few boats in the Van Camp fleet, haven't you? A. We do, yes, but I would—

Q. We just want you to help us—to give us an idea—

The Court: What difference does it make whether they were doing well or poor? Isn't the court going to have to [126] reach a determination upon the average return of this boat for the balance of the season or even that month?

Mr. Lande: Yes, that was the method I had in mind.

The Court: I don't know whether this boat was doing well or poorly. We haven't the figures here.

Mr. Lande: That is just what I asked this witness.

(Testimony of Fenton K. Gerstle)

The Court: He would not know either; it would be just his opinion.

Mr. Lande: I have no further questions.

Mr. Toner: I have one more question.

Redirect Examination

By Mr. Toner:

Q. Mr. Gerstle, when fishermen operate on a shares basis can they quit at any time they want?

A. Well, I believe they do.

Mr. Lande: There is no dispute about that. My witness testified to that.

The Witness: They do quit. I believe they are not allowed to be discharged but they can quit.

Q. By Mr. Toner: That is a union rule?

A. Yes, sir.

Mr. Toner: That is all.

Recross-Examination

By Mr. Lande:

Q. It is part of your union contract—it is a [127] matter of contract?

A. Yes, but not—of course the company might agree to that, but we don't. The union agreements are between the fishermen and the master of the boat and not with the company. The company has nothing to say about that at all.

Q. But the master is bound by it? A. Yes.

The Court: Let me ask you in this particular situation, with reference to the Bessemer, did the DiLevas have custody and possession of the boat?

The Witness: Well, you mean as far as the managing of the boat was concerned?

(Testimony of Fenton K. Gerstle)

The Court: Yes.

The Witness: Yes, we turned it over to them. Whether there was an agreement I don't know.

The Court: You turned it over to them?

The Witness: Yes; they operated it and delivered the fish to us.

The Court: And they dock the boat where they wanted to?

The Witness: Yes.

The Court: When it was not in use?

The Witness: They were supposed to keep the boat up.

The Court: Keep the boat up?

The Witness: That is right.

The Court: So that the only thing that concerned you [128] was the ownership of the boat, but the possession and operation of it had been turned over to them?

The Witness: Well, just the possession from the fact they were managing it but we didn't relinquish our ownership to them.

The Court: I am not trying to get you to say that you did not own the boat, but I am trying to ascertain the relationship.

The Witness: It is a working agreement, that is all it is.

The Court: When you charter a boat that is a working agreement, isn't it, whereby you are operating another man's vessel?

The Witness: That is right.

The Court: And that is what they were doing?

The Witness: That is what they were doing, yes.

The Court: That is all.

(Testimony of Fenton K. Gerstle)

Redirect Examination

By Mr. Toner:

Q. Mr. Gerstle, do you regard them as your employees?

Mr. Lande: I object to that as incompetent, irrelevant and immaterial, and calling for an opinion of the witness and a conclusion and not as a matter of fact.

The Court: If he knows.

Mr. Lande: How he regards them? [129]

The Court: How he regards them?

Mr. Lande: Yes.

The Court: That would not be admissible.

Q. By Mr. Toner: Mr. Gerstle, do you pay Social Security taxes on the employees of the fish boats?

A. When that boat was owned by us we did.

The Court: Did you deduct it?

The Witness: I took it from the crew and remitted it to the proper department.

Q. By Mr. Toner: Did you pay State unemployment relief taxes?

A. May I ask do you mean the 2.7?

Q. Yes. A. Yes, the company pays that.

Q. And you paid the Federal Social Security?

A. Yes, sir.

Q. Do you carry any Workmen's Compensation Insurance on these men?

A. I believe not. They are not covered—if I am not mistaken they are not covered.

Q. Is there any other tax or report that you have to make on these fishermen similar to reports you make for your other employees?

A. I don't understand your question.

(Testimony of Fenton K. Gerstle)

Q. As to any other— [130]

A. The only reports we make is for the Social Security, unemployment and old age and the withholding taxes. That is the only report we turn in for these fishermen.

Mr. Toner: That is all.

Mr. Lande: No questions.

Mr. Toner: The Respondent rests.

Mr. Lande: Mr. DiLeva.

ANTHONY DiLEVA (Bessemer),

called as a witness by and on behalf of the Libelants, having been previously duly sworn, resumed the stand and testified in rebuttal as follows:

Direct Examination

By Mr. Lande:

Q. Mr. DiLeva, as captain of the boat, can you tell us whether or not your vessel would have fished from the period October 4th to 13th, 1944, but for this accident?

A. There was no reason why it shouldn't. We had the crew.

Q. Your answer is you would have fished?

A. Yes, we would.

The Court: How about Saturday?

The Witness: Saturday, no. That is a union law.

The Court: There was one day in there you would not have worked?

The Witness: One day a week you wouldn't work. yes, sir. [131]

(Testimony of Anthony DiLeva—Bessemer)

The Court: As a matter of fact, there were seven fishing days that you lost?

Q. By Mr. Lande: Did you hear how the fish were running during this period of the 4th to the 13th?

A. Running heavy.

Q. Tell the court what you heard as to the—

The Court: I don't care what he heard.

The Witness: Not what I heard; I seen them coming in.

Q. By Mr. Lande: Tell the court what you saw?

A. We saw them all come in loaded.

Q. Loaded with what? A. Sardines.

Q. During that period of time? A. Yes, sir.

Mr. Lande: That is all.

Cross-Examination

By Mr. Toner:

Q. Mr. DiLeva, even on days when other boats catch full loads you sometimes miss, don't you?

A. Oh, often, yes.

The Court: You never know?

The Witness: Never know exactly.

The Court: What you are going to get?

The Witness: No; that is something you don't know until you go out. [132]

Mr. Toner: That is all, if the court please.

Mr. Lande: The Libelants rest, your Honor.

Mr. Toner: The Respondent rests, your Honor.

The Court: Gentlemen, I think the only thing to do with this case is submit it on briefs.

Mr. Toner: That is entirely satisfactory to us if the court believes so. It is rather complicated.

The Court: You are going to have a transcript of this testimony?

Mr. Toner: I rather believe that would be necessary.

The Court: But it seems to me, as I stated before, that your initial premise upon which you preliminarily attacked this proceeding is considerably weakened by the admission of this agreement. Apparently from the testimony it was a working agreement that had many of the earmarks of a charter. Of course Van Camps recognized that they were primarily interested in securing fish and all they wanted was to maintain a string of boats so they would have a steady supply of fish for their cannery.

Mr. Toner: The argument was based on the allegation in the libel that this was a shares agreement. Frankly I think the parties were operating on a true shares agreement. That is very customary in the fishing industry.

The Court: I understand that, but a shares agreement, in a sense, may take on the nature of a charter. [133]

I am going to give you gentlemen an opportunity to brief the case and I will listen to argument on the question of liability, but the burden is going to be on the Respondent in this case, because I am rather inclined to believe that the Gloria R was responsible for this accident. That is my present state of mind.

It may be that in pointing out the evidence I might change my views in that respect. I feel that this is more of a question which will resolve itself down to whether these fishermen have to take this loss by reason of their negligence in the operation of another boat, because both boats are owned by the same person or same company.

How long do you want to brief it?

Mr. Toner: I would like to have ten days after I get the transcript.

The Court: How long do you want to reply?

Mr. Lande: Ten days or five days.

The Court: I will give you 20 and 15. I am going to be away the latter part of next month so I will not be able to work on it.

Mr. Toner: 20 days from today.

The Court: You said you could have it in ten days, so I am giving you plenty of time—20 and 15, and then if I want any additional briefs I will call for them.

Mr. Toner: If the court please, on the question of the [134] photographs, I called the insurance company and they don't seem to have any photographs in their file. I was almost sure that they didn't have.

The Court: I think how this accident occurred is quite clear—that is, as to how the boats came together. I thought there might be a dispute when I was asking about it, but they are pretty well in accord.

Mr. Toner: The bow of the Bessemer and the amidships of the Gloria R came in contact with each other.

The Court: It will be considered submitted.

(Whereupon, at 3:00 o'clock p. m., the above entitled matter was concluded.)

[Endorsed]: Filed Jun. 20, 1946. Edmund L. Smith, Clerk.

Case No. 4630-PH. DiLeva vs. Van Camp. Lib. Exhibit No. 4. Date Oct. 30, 1947. No. 4 Identification. Date Oct. 30, 1947. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist of Calif. J. M. Horn, Deputy Clerk. [135]

[Title of District Court and Cause]

* * * * *

Los Angeles, California, Monday, April 7, 1947

10:00 A. M.

The Court: Call the calendar, Mr. Clerk.

The Clerk: Salvatore DiLeva and others versus Van Camp Sea Food Company, Incorporated.

Mr. Lande: Ready for the libelants.

Mr. Toner: Ready for the respondent.

The Court: I think I have heard all the argument on this case I care to hear. I am going to overrule the objections and direct that process issue for this new party so he will be brought into the suit.

Mr. Toner: If the court please, are we leaving the Van Camp Sea Food Company in the case?

The Court: Yes. I feel that part of the trouble in this case has been the court's own fault. What I should have done in the first place, after the hearing, I should have directed this other DiLeva be brought into the case and process issue.

As I understand the law DiLeva is a second party. If he is brought into the case and there is no cause of action against him he has his right of recovery.

Mr. Toner: We have been discussing this case prior to the hearing this morning and we practically came to the conclusion that under this Lowe vs. Goldstein case these men were all employees of the boat owner. The only point [3] that I make is that we are perfectly willing to stipulate that the employees, fishermen on the Gloria R were in the same status as the fishermen on the other vessel.

The Court: That is the reason I re-opened the case. There was intimation to that effect and as a matter of fairness and in order to avoid what I thought might be an injustice, I have worked and fussed and counsel have worked and fussed over this two-bit case for two years. I am going to clean it up and let you gentlemen take it to the Circuit Court and let them fuss around with it for a while. If you want to make a lawsuit over something I am going to give you plenty of opportunity to do so but I am going to direct process to be issued for this other DiLeva so he will have an opportunity to appear.

Mr. Lande: May I make a suggestion in the matter? It seems to me that if counsel is willing to stipulate—

The Court: How can he stipulate away the other man's rights? He is only appearing for Van Camp. If their status is the same then a judgment would be against DiLeva and he isn't appearing for DiLeva. He can't appear for both of them because their interests are antagonistic.

Mr. Toner: I don't think there is any technical adverse interest here, if the court please. It is either one or the other.

The Court: But as soon as you try to shift it from [4] Van Camp you are shifting it to DiLeva.

Now, if you can appear for both of them, all right, but DiLeva has not appeared in this case and there has been no process issued.

Mr. Toner: Currently that is right.

The Court: And I want process issued and we will dispose of it.

Mr. Lande: You see we had a trial as to liability although the DiLevas were in court.

The Court: But they were not parties to the action.

Mr. Lande: If Mr. Toner would stipulate that Van Camp is bound by the liability and by virtue of the fact that one of their employees operated the Gloria R—

The Court: But of course the intimation to this court is that DiLeva is operating under a bare bottom charter.

Mr. Lande: Of course I think counsel and I have been both educated since we came across the Goldstein case. That case squarely holds where the cannery controls, where that boat fishes and controls who is to be the master of the vessels then the crew and the master are the employees of the cannery. Now, the court will recall in this testimony here there is no question that Van Camp insisted that those boats fish for Van Camp. There is no question but they had control over who was the master of that vessel. There is no question that all the people were carried on their rolls as [5] employees. I think we would be wasting the court's time because those are absolute facts.

The Court: I have wasted a lot of time. I have a great big file over a two-bit case.

If you gentlemen can arrange it by stipulation and submit it to me, all right. But in any event I want a transcript of the proceedings—the first proceedings.

Mr. Toner: We have a transcript of it, and will furnish the court with a copy.

The Court: I will have to refresh my memory and then decide the case either right or wrong and let you men fight it out in the Circuit Court.

I have tried my best to get you men together on this two-bit case and if you want to spend a lot of money I am going to let you spend a lot more.

Mr. Toner: If counsel for the libelant will light some place and take a position as he is taking now, that these men were employees of Van Camp, there is no necessity for the DiLevas to be in the case. If counsel will submit an amended—

The Court: I have heard the evidence, gentlemen, and I am going to decide the law. You are not going to stipulate the law for me. I have heard the facts and I will pass on the law. All I want is a stipulation of facts as far as liability is concerned and who is liable or not is the [6] responsibility of the court.

Mr. Lande: I think we should be able to get together on a stipulation.

The Court: You gentlemen haven't been able to get together on anything. All you are able to do is run back and forth and run bills up on your clients for the last year and a half.

Mr. Lande: May we have a five-day stay to see if counsel can't get together on a stipulation, and if we can't then process will be issued?

The Court: I want to say this, gentlemen. If the second DiLeva is not in it you are going to get a judgment against you because I am satisfied in my own mind that you had a bare bottom charter and that the relationship of employer and employee did not exist. I am giving you now an opportunity to get in or get out. If you want to get yourselves out, all right.

Mr. Toner: If the court please—

Mr. Lande: We will bring the DiLevas in.

Mr. Toner: With all due respect to the court—

The Court: You don't have to show any respect to the court. I don't care anything about that.

Mr. Toner: I should like to ask the court to read the comments of the Circuit Court of Appeals in the case of Lowe vs. Goldstein that counsel was talking about, in which [7] the clear holding is that these men were employees of the cannery. Some attorneys in the lower court tried to get as much error in the record as they could—

The Court: And you have done a pretty good job in this case, both of you. There isn't any judgment I can render here that will hold water. I have tried my best to get you people to sit down around a table and settle this case instead of running up big attorney bills for both sides. Neither one of you are going to get out of it the amount of time you have put in even if you get all of your recovery.

Mr. Toner: At worst that is a mutual fault.

The Court: If you gentlemen want to submit it to me on a stipulation of additional facts that will be satisfactory.

Mr. Lande: We will see if we can work it out.

The Court: I am going to give you a decision so you can go to the Circuit Court and spend more money.

(Whereupon, the above entitled matter was concluded.)

[Endorsed]: Filed Mar. 5, 1948. Edmund L. Smith, Clerk. [8]

[Title of District Court and Cause]

* * * * * * * *

Los Angeles, California, Monday, June 30th, 1947
10:00 A. M.

The Court: You may proceed.

The Clerk: Anthony DiLeva and others versus Van
Camp Sea Food Company, Inc.

Mr. Toner: The respondent is ready.

Mr. Lande: The libellant is ready.

The Court: How soon can you gentlemen finish trying
this case?

Mr. Toner: If the court please, I should like to submit for the court's approval the question of whether or not the new party in this case can have the case tried anew without having this court being affected by the previous trial. I wonder if it wouldn't be, perhaps, advisable to have the case assigned to some other judge for trial because after all, the new party that is in this case is entitled to a complete trial on the merits and if this court feels that it might be swayed by its previous decision in this case—

The Court: Gentlemen, my position is this. If the parties do not feel they can have a fair trial before me I don't want to try the case.

Mr. Toner: I am not saying that.

The Court: If that is the state of mind of the party I don't want to try his case. I want him to feel when he gets through with this case that he has had a fair trial

and [3] if he feels that this court cannot give him a fair trial I don't want to try it.

You are representing him?

Mr. Toner: Yes.

The Court: And you are representing conflicting interests, too?

Mr. Toner: No.

The Court: You are representing conflicting interests because as attorney here before this court you are also representing the Van Camp Sea Food Company and the other party. It is a question of whether or not both are liable or either are liable and therefore there is a conflict of interest.

That party should have independent advice.

Mr. Toner: The contention of both defendants is identical in that both defendants are respondents, or the respondents contend that the fish boss was an employee of the Van Camp Sea Food Company and the contentions being identical there can be no adverse interest.

I can appreciate the court's statement if Van Camp Sea Food Company were to say, "Oh, no, you fellows are charterers," and then the fish boss would turn around and say, "We are not charterers; we are employees."

But both parties are maintaining the same identical contention on the same identical issue. [4]

The Court: I continued this matter for your benefit as the representative of the Van Camp Sea Food Company. If it is still your position that the Van Camp Sea

Food Company is liable here, if there is any liability, I can settle the case without any further trial.

Mr. Lande: I would suggest that course of action in view of counsel's statement.

Mr. Toner: Our position is that this alleged charterer which the libellant brought in at the court's suggestion, is clearly an employee under the previous holding of the Ninth Circuit in *Lowe* against *Goldstein*.

The Court: Well, gentlemen, I will disqualify myself in this case and direct the case be assigned to another judge and I will get rid of you people that way very quickly.

I don't like the smell of it as far as you are concerned, coming in here and representing conflicting interests. And as far as you are concerned I hope that you never come back in this court again. I guess you hope you never have to.

Mr. Toner: Well, we will be back, Judge.

The Court: Now, just a moment. I feel that your statement has been a reflection on this court. I have heard this case. I have tried to give it consideration so that you people could have your full day in court and you come in here representing what on the face of it, as far as the evidence [5] is concerned, conflicting interests and I don't want you in this court any more. I am going to disqualify myself and as far as you are concerned if you have any other cases in this court have some other member of your firm appear here.

Mr. Toner: I am very sorry, sir, that the court feels that way about it.

The Court: That is the order. It is re-assigned to some other judge and you can fight it out there and pull your hot stuff on them, but you can't pull any more of it on me.

(Whereupon, the above entitled matter was concluded.)

[Endorsed]: Filed Mar. 5, 1948. Edmund L. Smith, Clerk. [6]

[Endorsed]: No. 11877. United States Circuit Court of Appeals for the Ninth Circuit. Van Camp Sea Food Company, Inc., a corporation, Appellant, vs. Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnavale, Matteo Vologna, Pasquale Guglielmo and Pietro Colombo, Appellees. Apostles on Appeal Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 8, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

14. The District Court erred in awarding damages and costs to appellee in the amounts assessed or at all.

The appellant hereby designates the following parts of the record which it thinks necessary for a consideration of the foregoing points:

* * * * * * * *

Dated March 16, 1948.

McCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
HAROLD A. BLACK
GEORGE E. TONER

Proctors for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,
Clerk.